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IN THE

Supreme Court of the United States

October Term, 1967

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

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Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

The subject on appeal in this mandamus proceeding was previously the subject of an appeal to this Court in a declaratory judgment proceeding from the same State Court, on the same Federal questions, and on the Trial Court's similar action of dismissal on the ground it was an action against the state and prohibited by the *state constitutional immunity provision* (previous Jurisdictional Statement, Appendix A). *Howard Price d/b/a etc.* v. *State Road Commission of West Virginia et al*, 382 U. S. 20 (1965).

On Appellees' Motion To Dismiss Appeal in the previous proceeding, the Attorney General of West Virginia *represented to this Court that Appellant had available in the State Court an adequate remedy in the form of this mandamus proceeding to compel the institution of eminent domain*

proceedings to acquire Appellant's property which was appropriated by the State Road Commission. (Motion To Dismiss Appeal in previous proceeding, Appendix B). This Court sustained Appellee's Motion and dismissed the appeal in the previous proceeding *"in the light of the representations of the Attorney General of West Virginia, that Appellant had an effective State procedure of which he had not availed himself"*. (382 U.S. 20, Appendix C). Pursuant to the representations of the Attorney General to this Court, Appellant instituted this *mandamus proceeding to compel the institution of eminent domain proceedings.* Appellees by demurrer in this mandamus proceeding then *repudiated* the representations of Attorney General to this Court, and *on the same grounds* on which it dismissed the declaratory judgment proceeding, the Trial Court *dismissed this mandamus proceeding.* The subject matter and same Federal questions now come again before this Court. This controversy has been in the Courts since May 24, 1963.

Appellant, Howard Price, dba Howard Price and Company, appeals from the judgment of the Circuit Court of Kanawha County, West Virginia, entered on June 25, 1966, dismissing Appellant's petition in mandamus on the ground it constituted a suit against the State of West Virginia. On petition for writ of error timely filed, the Supreme Court of Appeals of West Virginia, by order entered December 5, 1966, refused to review the judgment; and on a second petition timely filed, said Court by order entered February 20, 1967, again refused to review the judgment and returned the record to the Circuit Court of Kanawha County. The time for re-petitioning for writ of error has expired. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented.

OPINION BELOW

The letter opinion of the Circuit Court of Kanawha County, West Virginia, dated March 11, 1966, is not re-

ported. A copy of the opinion was made part of the record in the proceeding and is attached hereto as Appendix D.

JURISDICTION

Appellant filed his petition in mandamus in the Circuit Court of Kanawha County, West Virginia, on January 5, 1966. The petition sought to compel the State Road Commission of West Virginia and the Road Commissioner to institute eminent domain proceedings to acquire Appellant's materials, work, labor and services incorporated into a public highway pursuant to a construction contract and which property of Appellant was appropriated by the Road Commission and the Road Commissioner without payment. It asked for other appropriate relief, including alternatively, a declaration of the rights of Appellant under the highway construction contract and upon such declaration of rights, compulsion of the Road Commissioner to perform his statutory duty to audit Appellant's claim for work and materials performed and supplied. By the alternative prayer for relief, appellant incorporated in this mandamus proceeding a prayer for a declaration of rights such as was sought in the previous declaratory judgment proceeding, which in effect, again submits the propriety of declaratory relief for judicial consideration. On June 25, 1966, the Court entered its final judgment order sustaining Appellees' demurrer and dismissed the proceeding as a suit against the State. This is the judgment upon which review is sought (Appendix E).

Appellant thereupon filed his petition for writ of error to the Supreme Court of West Virginia on August 24, 1966. On December 5, 1966, the Supreme Court of Appeals of West Virginia entered its order refusing to review the case (Appendix F) and on second petition for writ of error, said Court on February 20, 1967, again refused to review the case (Appendix G). The time for re-petitioning had expired and the record was returned to the Circuit Court of Kanawha County.

Notice of appeal to the Supreme Court of the United States was filed with the Circuit Court of Kanawha County on April 17, 1967.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by Title 28, United States Code Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment and the commerce clause of Section 8, Article I, of the Federal Constitution, on the facts of the case, is within the purview of such section *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall 611; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U. S.* v. *County of Allegheny*, 322 U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginia R. Co.* v. *Mullens*, 271 U.S. 220.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184; *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Rolston* v. *Crittenden*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of

the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted to voters; Ratified 1936. (The amendment added an exception pertaining only to garnishment which is not here relevant):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

2. Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding Section 52, Article VI. This section is also pertinent. It establishes the State Road Fund, directs that all revenues from highway users be paid into it, and provides that it be used for the "payment of obligations incurred in the construction . . . of public highways." (See Appendix H for text).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code (unofficial) conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation):

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES. — The State Road Commission of West Virginia, heretofore created and *existing as a corporation*, shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code (1966), p. 7) (Italics supplied.)

* * *

2. The following statutes are also pertinent as pertaining to the State Road Fund, its use to pay the cost of road construction, the methods of disbursements therefrom, including the Road Commissioner's duty to audit contractors' claims and issue requisitions for their payment; and the direction that road construction shall be performed under contract awarded by bid and bonded, giving detailed statutory requirements:

Chapter 17, Code of West Virginia, 1931, as amended:

Article 3, Sections 1, 2 and 4

Article 4, Sections 19, 20 and 21

(See Appendix I for pertinent parts of above sections, and official reference to amending Acts of the Legislature)

QUESTIONS PRESENTED

After the appeal in the previous declaratory judgment proceeding was expressly dismissed by this Court on Appellees' representations that mandamus to compel eminent domain proceedings was Appellant's effective state remedy

(more fully set forth in opening paragraphs of this Jurisdictional Statement, pp. 1, 2), Appellant, a highway contractor, filed a petition in mandamus against Appellees, The Road Commission and Road Commissioner, to compel them to institute eminent domain proceedings to legally acquire his property in the form of material, work, services, and labor incorporated into a public highway pursuant to a highway construction contract between Appellant and Appellees. Appellant alleged he had completed 80% of the contract, that his working time was not expired, that the Appellees, by arbitrary actions and without legal authority, stopped Appellant's performance, abrogated his contract without paying him for all the work performed by him, and appropriated his material and services of a worth of $1,387,-046.55 incorporated into a public highway which was part of the Federal Interstate System.

Appellees then repudiated their representations to the U. S. Supreme Court and again claimed State immunity by demurrer to Appellant's petition. The petition in mandamus in addition to seeking to compel Appellees to institute eminent domain proceedings, asked also for other appropriate relief, including alternatively, a declaration of the rights of the parties, as sought in the previous declaratory judgment proceeding. On Appellees' demurrer, the trial Court again held the proceeding was against the State of West Virginia and absolutely prohibited. In the premises, the questions presented are:

1. Were the actions of the Road Commission as alleged and the action of the trial Court, in applying the immunity provision of the State Constitution and dismissing the mandamus and alternative declaratory judgment proceeding, repugnant to:

(1) Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

(a) constituted a denial of due process of law by the State?

(b) constituted the taking by the State of private property for public use without just compensation?

(c) constituted a denial by the State of equal protection of the law?

(2) Section 8, Article I, of the Federal Constitution on the grounds that they constituted an interference with and burden upon interstate commerce?

2. Does the application by the trial Court, on Appellees' demurrer, of the immunity provision of the State Constitution to Appellant's petition for mandamus and alternatively a declaration of rights, and without further proceeding on the merits, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal questions are initially presented by Appellant's mandamus petition (Appendix J). The mandamus petition alleges in part as follows (Appendix J, p. 107a):

> "That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn *duty to abide by and uphold the Constitution * * * of the United States, and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty, or property without due process of law as required by Section 1 of the Fourteenth Amendment to the Federal Constitution * * * nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid)* * *. In pursuance of the duties aforesaid, it is the further duty of said Road Commission and Road Commissioner, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for

private property taken and appropriated by them for public use." (Emphasis supplied)

After alleging the property appropriated by the Appellees, the mandamus petition further charges (Appendix J, p. 126a):

> " * * * that Respondents, NOTWITHSTANDING their duties *not to deprive Petitioner of his property without due process and not to take such property for public use without just compensation as guaranteed by the Federal constitutional provisions aforementioned,* did wrongfully abrogate said contract and deprive Petitioner of his property right therein, and did wrongfully take and appropriate his work, services, labor, and materials incorporated in the public highway and deprive Petitioner of his property therein without due process and did take same for public use *without just compensation in violation of the Federal constitutional provisions* aforementioned, and NOTWITHSTANDING Respondents' further duty, * * * have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioner and pay him just compensation therefor. (Emphasis supplied)

Appellees filed a demurrer and an answer to the petition, the salient point of which was that the proceeding was a suit against the State of West Virginia and prohibited by the immunity provision of the State Constitution. No responsive pleading to a demurrer is permissible. To Appellees' answer, Appellant filed a demurrer and a reply which again set forth the Federal grounds as follows (Record pp. 144, 151):

> "(1) Petitioner's rights are grounded on Section 1 of the Fourteenth Amendment and on the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment, and the gravamen of said petition is the violation of Petitioner's property rights protected thereby, and any application of the immunity provision of the State Constitution to the facts of this case and

the protection of Petitioner's property rights is repugnant to the rights guaranteed to Petitioner by the Federal Constitution as aforesaid and would deprive Petitioner of his property without due process and constitute a taking of private property for public use without just compensation."

The trial Court issued its opinion by letter dated March 11, 1966, and entered its final order in conformity therewith sustaining Appellees' demurrer and dismissing the proceeding on the ground that it was an action against the State of West Virginia. The trial Court noted Appellant's constitutional arguments in its opinion (Appendix D, page 89a) stating:

"* * * The Petitioner here strongly contends and argues that Article VI, Section 35, of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner."

The Appellant's objections to the Court's ruling and his reasons therefor were noted in the final order itself (Appendix E, p. 96a). The reasons embracing Federal grounds read as follows:

"1. The application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives the Petitioner of his property without due process of law, and constitutes the taking of private property for public use without compensation."

"2. The State has consented to suit against Respondents by its participation of the subject highway project in the Federal Interstate Highway Program, and the application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I, of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce."

Appellant continued to raise the Federal questions in the Assignment of Errors in each of his petitions for writ of error (Record, pp. 9, 31) to the Supreme Court of West Virginia, the pertinent parts of which read almost verbatim the objections set forth in the final order as above.

The objections and the assignments of errors were denied by the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia, respectively.

STATEMENT OF THE CASE

Appellant's petition in the trial Court alleges (Appendix J, p. 105a) the previous proceeding, the appeal thereof to this Court, the representations therein made by Appellees that mandamus was the proper remedy, and the action of this Court in dismissing the appeal in the light of such representations, all of which is more fully set forth in the opening paragraphs of this Jurisdictional Statement.

The petition further alleges as follows. That Appellees have the constitutional duty not to deprive any person of property without due process of law or to take property for public use without compensation, and in the premises of such constitutional duties, upon the appropriation of private property for public use, the further duty to institute eminent domain proceedings to legally acquire it and pay for it. (Appendix J, p. 107a).

The petition further alleges that Appellant entered into the highway construction contract with the Road Commission for the construction of a portion of Interstate Highway

64 (Appendix J, p. 108a). There is also set forth: the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work, and issue requisitions for the payment thereof from the State Road Fund (Appendix J, p. 106a); pertinent contract provisions that the Appellant was to be paid monthly estimates (Appendix J, p. 109a); that Appellant would be paid the contract bid price for the actual quantities necessary to complete the project, and a fair and reasonable price for items necessary and not included in the original contract (Appendix J, p. 109a); and that the work was under the supervision and control of the Commissioner and his engineers, who had authority to suspend work if his orders were not carried out (Appendix J, p. 109a). The items of work involved in this action, the prices, and the quantities thereof, both as planned and as performed by Appellant, were described in detail (Appendix J, p. 110a), alleging that such work, services, labor and materials were property within the protection of the Federal constitutional guarantees and the constitutional duties of Appellees not to appropriate them for public use without just compensation.

Appellant was not paid by monthly estimates as required by the contract. The total amount still due for his work, services, labor and materials performed and now incorporated into the highway, and being the value of Appellant's property, is $1,387,046.55, which the Road Commissioner without right or authority, has refused to audit and certify for payment, and has refused to institute eminent domain proceedings to legally acquire (Appendix J, p. 126a). (The Appellees' affidavits in the previous proceeding admitted that Appellant had not been paid for all his work.)

The complaint further alleges numerous instances of arbitrary orders, contradictory orders, and capricious conduct on the part of Appellees, forcing Appellant to perform his work under conditions of hinderance, harassment, and delay. All of such arbitrary and contradictory orders were issued

by the Appellees under threats, either express or implied, of work suspension if not complied with by Appellant (Appendix J, p. 112a).

When Appellant had performed approximately 80% of the work (Appendix J, p. 112a), and was insistent that the Road Commission pay him the monthly estimates for work performed and otherwise abide by its contract, the Road Commissioner arbitrarily and without legal justification publicly declared his progress was unsatisfactory and his contract in default (Appendix J, p. 112a, 123a, 124a). Although requested so to do, the Road Commissioner, over Appellant's protests, terminated his work, ordered him off the project, and removed the Commission engineer, so he could proceed no further (Appendix J, p. 123a). Appellant was not in default (Appendix J, p. 125a), and at the time he was removed from the project, Appellant's working time had not expired. (The Road Commissioner re-let the contract to another contractor.)

The majority of Appellant's contracts have been with the State Road Commission of West Virginia. Prior to the contract here involved, he has never had a contract declared in default, and in his 36 years of experience with the State Road Commission, it has never expressed any dissatisfaction with the performance of his contracts.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

1. The decision of the trial Court refuses to follow the decision of this Court by permitting Appellees to repudiate the representations made to and relied upon by this Court on the previous appeal, 382 U.S. 20 (1965).

2. The appeal to this Court in the previous declaratory judgment proceeding was on the same Federal questions arising from the application of the immunity provision of the State Constitution. Appellees, through the State Attorney General, represented in their motion to dismiss that "Appellant's proper and still available course was . . .

to institute * * * mandamus to compel Eminent Domain proceedings." (Appendix B, p. 79a). This Court dismissed such appeal expressly in the light of such representation. By demurrer to this mandamus proceeding, Appellees repudiated their representations to this Court, and again asserted the State Constitutional immunity provision. The trial Court held that the Appellees' representations and this Court's dismissal expressly in the light thereof did not become the law of the case, and that Appellees were not estopped by the record to again assert immunity. This holding is contrary in principle to the decisions of this Court in *Cowley* v. *Northern P. R. Co.*, 159 U.S. 569; *Fisher* v. *Shropshire*, 147 U.S. 133; *Davis* v. *Wakelee*, 156 U.S. 680; *Fletcher* v. *Peck*, 6 Cranch 87, 137; *The New Philadelphia (Camden & A. R. Transport Co.* v. *Brady)*, 1 Black 62.

3. The importance of these questions is of grave and immediate concern to all highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commission through the Road Commissioner, who undertakes it through contracts with private concerns. The Road Commissioner, by law, is vested with extensive powers. With the expanding program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. In the fiscal year 1965-66, the Road Commissioner spent *36.28% of all funds spent by the State of West Virginia* (Official West Virginia Blue Book, 1966, p. 920) being the largest expenditure by the State for any one function. *If the Road Commissioner, under the facts of the case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are far-reaching.* The trial Court's decision would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being. It

allows the state's immunity to become an instrument of favoritism, a tool of oppression, and a cloak for incompetence.

4. These questions are equally important to the citizens of this State who by State Constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly, it is important to the Federal government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* 90% of the cost of the Interstate project here involved was paid for by the Federal government. The Road Commission is utilized by the Federal government as its agent in the exercise of its Constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of Federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

If the Road Commission and the Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors, so that the contractors are unable to secure an impartial adjudication of their rights under their contracts and the protection of their property, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis, this poses a wasteful drain upon the funds provided for the purpose by both State and Federal governments. (The trial Court noted its personal opinion (Appendix D, p. 93a) that "the doctrine of *immunity*

. . . *as stated in our Constitution, is archaic* and completely out of step with the times, when we observe the government, state and federal, engaging in big business"):

5. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both State action within the meaning of the Fourteenth Amendment (*Shelley* v. *Kraemer*, *McGhee* v. *Sipes*, 334 U.S. 1). Appellant's work, material, and services already performed and incorporated into the public highway, and his rights under the contract are "property" within the protection of the due process and equal protection of law provisions of the Fourteenth Amendment (*Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *West* v. *Chesapeake and Potomac Tel. Co.*, 295 U.S. 662; *Monongahela Navigation Co.* v. *U. S.*, 148 U.S. 312; *U. S.* v. *GMC*, 323 U.S. 373; *U. S.* v. *Peewee Coal Co.*, 341 U.S. 114. The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the State by the privileges and immunities clause of the Fourteenth Amendment (*West* v. *C. & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

6. This is a suit against the State Road Commissioner for wrongfully exceeding his authority in appropriating Appellant's property under color of office, and for failing to perform his Constitutional duty to legally acquire it through eminent domain proceedings. In this respect, the holding of the lower Court in refusing mandamus is in conflict with the decisions of this Court in *Rolston* v. *Crittenden*, 120 U.S. 390; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82; *Board of Liquidation* v. *McComb*, 92 U.S. 531; and *Noble* v. *Union River Logging Company*, 147 U.S. 165; and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

7. *Mahone* v. *State Road Commission*, 99 W. Va. 397, 129 S.E. 320, decided in 1925 by the State Supreme Court,

held that the statute authorizing the Road Commission as a body corporate, to be sued, violated the State Constitutional prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was *absolute* and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957, the Legislature nevertheless did not delete the consent to be sued, *but on its reenactment reaffirmed its position that the Road Commission could sue and be sued.* These judicial holdings *impose a stringency in excess of the common law doctrine of immunity.* Under such holdings, it is impossible to give consent, although in fact *the Legislature has consented to suits against the Road Commission.* Such holdings, as against the assertion of a Federal right, constitutional or statutory, are in conflict with the decision of this Court in *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184. It is likewise in conflict with *Lawrence* v. *State Tax Commission*, 286 U.S. 276, for the Federal Constitutional guarantee of due process likewise insures the privilege to have that right judicially declared and protected.

8. The trial Court, in ruling on appellees' *demurrer*, took the position that by virtue of the decisions of the State Supreme Court, this mandamus proceeding was subject to the same infirmity as the previous declaratory judgment proceeding; was an action against the State; and "merely a further effort on the part of the Petitioner to enforce a right which under the West Virginia Constitution, he cannot enforce in this proceeding. . ." (Trial Court Opinion, Appendix D, p. 94a). The trial Court's ruling in this respect, without the taking of evidence on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is in conflict with this Court's de-

cision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204.

9. Inherent in the trial Court's opinion was its opinion in the previous declaratory judgment proceeding, that the proceeding was against the State in view of the fact that to compel the Road Commissioner to perform his duty to institute eminent domain proceedings would set in motion a sequence of events which would ultimately result in the payment of money from the State Road Fund. This holding is contrary in principle to the decision of this Court in *Houston* v. *Ormes*, 252 U.S. 469.

The State Road Fund by constitutional provision is a special fund and not part of the general revenue; it consists of the revenues from highway users, the use of which is solely restricted to the construction and maintenance of highways; and the payments therefrom are held not to be on debts of the State. (*State Road Commission* v. *O'Brien*, 140 W. Va. 114, 82 S.E. 2d 903)

10. These Federal questions are substantial to Appellant not only because of the extent of the property of which he has been deprived, but also because *the Road Commissioner has deprived him of the right to earn a livelihood in his chosen occupation.* Highway construction contracts are required to be bonded and *it is impossible for Appellant to secure the necessary bonds for any work as long as the Commissioner's action in abrogating his contract stands unresolved.*

11. On demurrer, the allegations of Appellant's petition must be assumed to be true, *Ickes* v. *Fox*, 300 U.S. 82, 96. The facts alleged are that the Road Commissioner, by refusing to institute eminent domain proceedings, has appropriated $1,387,046.55 of Appellant's property as incorporated in the public highway, without compensation to Appellant. *Appellant has been deprived of his property for public use, denied his compensation therefor, and re-*

fused the opportunity to establish his rights. Appellant has not had his day in Court, he has not had the due process of law.

CONCLUSION

The questions presented on this appeal are of public importance, affecting the State and Federal highway construction program and the highway construction industry. They comprehend the required extent of governmental morality, the accountability of State officials, and the necessary balance between the prerogative of governmental authority and the Constitutional rights of the individual. Appellant submits that the precedents established by this Court do not support the decision of the Circuit Court of Kanawha County, but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

April 25, 1967

Respectfully submitted,

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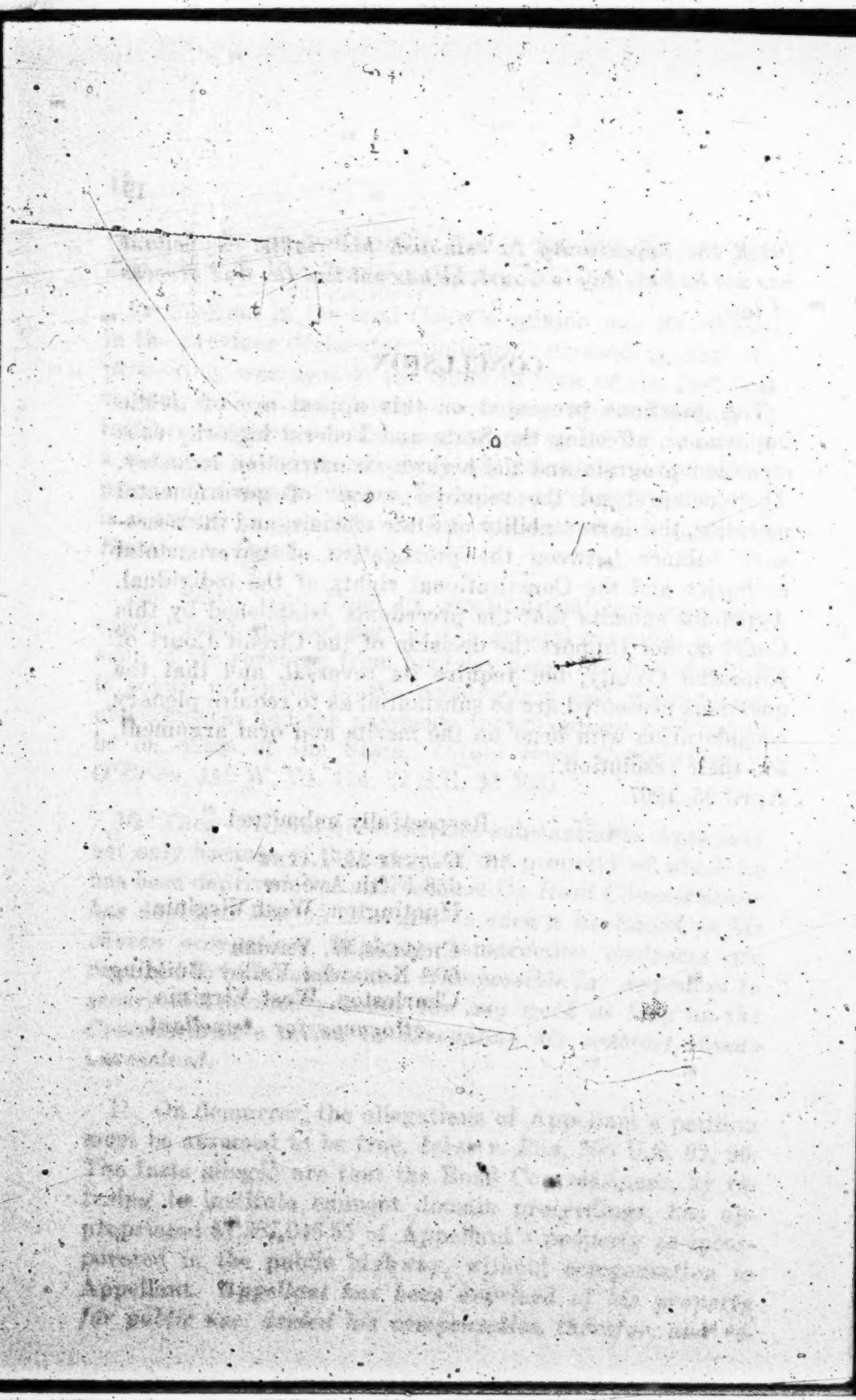

No. ——

IN THE

Supreme Court of the United States

October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

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Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellant Howard Price d/b/a Howard Price and Company, appeals from the judgment of the Circuit Court of Kanawha County, West Virginia, entered on May 19, 1964, dismissing Appellant's complaint on the ground it constituted a suit against the State of West Virginia. On petition timely filed, the Supreme Court of Appeals of West Virginia, by order entered February 22, 1965, refused to review the judgment and returned the record to the Circuit Court of Kanawha County. The time for re-petitioning has expired. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The letter opinions of the Circuit Court of Kanawha County, West Virginia, dated November 7, 1963, and April 13, 1964, are not reported. Copies of the opinions are attached hereto as Appendix A and B respectively.

JURISDICTION

Appellant filed his declaratory judgment complaint in the Circuit Court of Kanawha County, West Virginia, on May 24, 1963, pursuant to Chapter 26, Acts of the West Virginia Legislature, Regular Session 1941, p. 132, (Appendix C), being Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and Rule 57 of the West Virginia Rules of Civil Procedure, 144 W. Va. Reports, p. xcviii, (Appendix D). The complaint sought a declaratory judgment as to the rights of Appellant under a highway construction contract entered into by him with the State Road Commission of West Virginia, asking: (1) that the rights of the parties be declared; and sequentially, (2) that after a declaration of rights, the Road Commissioner be compelled to perform his statutory duty to audit Appellant's claim for work performed by Appellant.

On May 19, 1964, the Court entered its final judgment order sustaining Appellees' motion to dismiss the proceeding as a suit against the State. It is the judgment upon which review is sought (Appendix E).

Appellant thereupon filed his petition for appeal to the Supreme Court of West Virginia on December 30, 1964. On February 22, 1965, the Supreme Court of Appeals of West Virginia entered its order refusing to review the case. The time for repetitioning had expired and the record was returned to the Circuit Court of Kanawha County.

Notice of appeal to the Supreme Court of the United States was filed with the Circuit Court of Kanawha County on April 24, 1965.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by Title 28, United States Code Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment on the facts of the case, is within the purview of such section *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall. 661; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U. S.* v. *County of Allegheny*, 322 U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginia R. Co.* v. *Mullens*, 271 U.S. 220.

The cause presents a justiciable controversy and meets the conditions which establish the validity of the declaratory procedure as set forth in *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U.S. 249 and *Evers* v. *Dwyer*, 358 U.S. 202.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Rolston* v. *Crittenden*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted

to voters; Ratified 1936. (The amendment added an exception pertaining to garnishment):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

2. Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding section 52, Article VI. This section is also pertinent. It establishes the State Road Fund, directs that all revenues from highway users be paid into it, and provides that it be used for the "payment of obligations incurred in the construction . . . of public highways." (See Appendix F for text).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES. — The State

Road Commission of West Virginia, heretofore created and *existing as a corporation*, shall be and is hereby continued as in this article provided. The commission is hereby authorised and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1445 (1)), p. 866.) (Italics supplied.)

* * *

2. The following statutes are also pertinent as pertaining to the State Road Fund, its use to pay the cost of road construction, the methods of disbursements therefrom, including the Road Commissioner's duty to audit contractors' claims and issue requisitions for their payment; and the direction that road construction shall be performed under contract awarded by bid and bonded, giving detailed statutory requirements:

Chapter 17, Code of West Virginia, 1931, as amended:

Article 3, Sections 1, 2 and 4

Article 4, Sections 19, 20 and 21

(See Appendix G for pertinent parts of above sections, and official reference to amending Acts of the Legislature)

QUESTIONS PRESENTED

Appellant filed a declaratory judgment complaint against the Road Commission and Road Commissioner asking a declaration of the rights of the parties under a highway construction contract between Appellant and Road Commissioner. Appellant alleged he had completed 80% of the contract; and that the Road Commissioner by arbitrary actions and without legal authority had stopped Appellant's

performance, abrogated his contract without paying him for all the work performed by him, and appropriated his material and services of a worth of $1,338,511.67 as incorporated into a public interstate highway. The Road Commissioner refused to certify for payment the $1,338,511.67 worth of work already performed under the contract and not paid for. As permitted by the West Virginia Rules of Civil Procedure the complaint asks that after the rights were declared, that Appellant be granted coercive relief compelling the Road Commissioner to perform his statutory duty to audit the claim, certify the work, and issue a requisition for its payment from the State Road Fund. On motion to dismiss the Court held the proceeding was against the State of West Virginia and absolutely prohibited. The questions presented are:

1. Were the actions of the Road Commissioner as alleged, and the action of the trial Court, in applying the immunity provision of the State Constitution, and dismissing the proceeding, repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

   (1) Constitute a denial of due process of law by the State?

   (2) Constitute the taking by the State of private property for public use without just compensation?

   (3) Constitute a denial by the State of the equal protection of the law?

2. Does the application by the State Court of the immunity provision of the State Constitution, to Appellant's complaint, on Appellees' motion to dismiss, and without further proceeding on the merits, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Appellees filed two successive motions to dismiss the complaint on the ground that the proceeding was a suit

against the State of West Virginia and prohibited by the immunity provision of the State Constitution. The motions were almost verbatim, but there were attached to the second motion affidavits (one 12 pages long) which were in essence a denial of the complaint and filed for the purpose of showing there existed a "substantial controversy of fact" between the parties. It was at this initial stage that the federal questions were raised.

The West Virginia Rules of Civil Procedure allow no responsive pleading to a motion to dismiss, and the federal questions were raised in argument, both orally and by brief, on the motions to dismiss. Appellant argued that the application to this case of the state constitutional provision on immunity, for work, material and services already performed by Appellant, and incorporated into the public highway, and for which the Road Commissioner had no right or authority to refuse to certify, and for which he had a statutory duty to audit, and issue a requisition for payment from the constitutionally established State Road Fund, would deny Appellant the due process and equal protection of law, and allow his property to be taken by the Road Commission for public use without any compensation to him.

The trial Court issued its opinion on the first motion by letter dated November 7, 1963, and on November 16, 1963 entered its order in conformity therewith, overruling said motion insofar as it pertained to the work performed and allowing Appellant to proceed as to declaring the rights for the work already performed and incorporated in the highway.

The trial Court issued its opinion on the second motion by letter dated April 13, 1964, and upon which was entered the final judgment order (Appendix E) sustaining Appellees' motion in its entirety and dismissing the proceeding on the ground that the proceeding was an action against the State of West Virginia.

The trial Court noted Appellant's constitutional arguments in its first opinion (Appendix A, p. 6a) stating:

> "Counsel for the plaintiff argue that the inhibition of Article VI, Section 35 of the Constitution is not absolute but, to the contrary, must be considered in the light of due process provisions of federal and state constitutions."

The Appellant's objections to the Court's ruling and his reasons therefor, were noted in the final order itself. The reasons embracing federal grounds read as follows:

* * *

> "2. The Court's ruling denies Plaintiff the rights guaranteed to him under Section 10, Article I of the Constitution of the United States, and under Section 1, Article XIV of the Amendments to the Constitution of the United States."

* * *

Appellant further raised the federal questions in his Assignments of Errors (Record p. 31) contained in his petition for appeal to the Supreme Court of West Virginia, the pertinent parts of which read as follows:

* * *

> "10. The dismissal of the action denied the Plaintiff the right of due process guaranteed under both the State and Federal Constitutions."
>
> "11. The dismissal of the action denied the Plaintiff the right to receive just compensation for private property taken for public use guaranteed by both the State and Federal Constitutions."

* * *

The objections and the assignment of errors were denied by the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia respectively.

An amplified restatement of these Federal questions appears in the order certifying the existence of Federal

questions and entered by the trial Court on April 24, 1965, (Appendix H), the pertinent parts of which read as follows:

> "... and it hereby is certified and by this order made a part of the record in this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments made in this Court on behalf of the Plaintiff, upon Defendants' motions to dismiss, it was insisted and relied upon by said Plaintiff, that the application of Section 35, Article VI of the Constitution of West Virginia to this case would deprive Plaintiff of his property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution, and it became material and necessary to the determination of this case by this Court to determine this question so raised by the Plaintiff: ..."

• • •

STATEMENT OF THE CASE

Appellant's complaint is attached as Appendix I. In essence it alleges as follows. Appellant entered into a highway construction contract with the Road Commission for the construction of a portion of Interstate Highway 64 (Appendix I, p. 32a). There is set forth the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work and issue requisitions for the payment thereof from the State Road Fund. (Appendix I, p. 31a). The Appellee, Wilson Ward, as Director of the Construction Division is a representative and agent of the Road Commissioner. (By stipulation it was agreed that by statutory amendment the duty to audit claims and issue requisitions had been transferred from the Commission Members to the Road Commissioner. The Commission Members were dropped as parties.)

There is set forth pertinent contract provisions that the Appellant was to be paid by monthly estimate; that Appellant would be paid the unit bid price for the actual quanti-

ties necessary to complete the project, and a fair and reasonable price for items necessary and not included in the original contract; and that the work was under the supervision and control of the Commissioner and his engineers who had authority to suspend work if his orders were not carried out (Appendix I, pp. 32-33a). The items of work involved in this action, the prices, and the quantities thereof both as planned and as performed, were described in detail (Appendix I, pp. 33-36a, 38-40a, 42a, 47a).

Appellant was not paid by monthly estimate as required by the contract. *The total amount still due for work performed and now incorporated into the highway is $1,338,511.67, which the Road Commissioner without right or authority has refused to audit and certify for payment.* (Appendix I, p. 470). The Appellees' affidavits in support of their second motion to dismiss admitted Appellant had not been paid for all his work (Record, p. 101).

The complaint further alleges numerous instances of arbitrary orders, contradictory orders, and capricious conduct, on the part of the Appellees, forcing Appellant to perform his work under conditions of hinderance, harassment and delay. All of such arbitrary and contradictory orders were issued by the Appellees under threats, either express or implied, of work suspension if not complied with by Appellant (Appendix I, pp. 35a, 37-41a, 43-44a).

When Appellant had performed approximately 80% of the work (Appendix I, p. 35a), and was insistent that the Road Commission pay him the monthly estimates for work performed, and otherwise abide by its contract, the Road Commissioner arbitrarily and without legal justification publicly declared his progress was unsatisfactory and his contract in default (Appendix I, p. 43a). Although requested so to do, the Road Commissioner refused to rescind this order (Appendix I, 46a). The Road Commissioner, over Appellant's protests, terminated his work, ordered him off the

project, and removed the Commission engineer so he could proceed no further (Appendix I, p. 44a). Appellant was not in default (Appendix I, p. 45a), and at the time he was removed from the project, Appellant's working time had not expired. The Road Commissioner re-let the contract to another contractor (Appendix I, p. 44a).

The majority of Appellant's contracts have been with the State Road Commission of West Virginia. Prior to the contract here involved, he has never had a contract declared in default, and in his 36 years of experience with the State Road Commission it has never expressed any dissatisfaction with the performance of his contracts (Appellant's Reply Affidavit to Appellees' Affidavits, Exhibit J).

Pending the Court's ruling on Appellees' second motion to dismiss, Appellees provisionally filed their answer and a counterclaim asking damages for $750,000. Appellant in turn filed a counterclaim to Appellees' counterclaim, for damages of $2,000,000, on the ground that the filing of the counterclaim by Appellees had waived any question of immunity. Both counterclaims were dismissed in the final order.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented on this appeal involve the underlying questions: (1) whether or not the immunity of the State under West Virginia's peculiar constitutional provision is available as a defense to the Road Commission and the Road Commissioner under the particular allegations of Appellant's complaint and the relief sought therein; and (2) if so, at what stage such a defense can properly be raised.

1. The importance of these questions is of grave and immediate concern to all highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commis-

sion through the Road Commissioner, who undertakes it through contracts with private concerns. The Road Commissioner by law is vested with extensive powers, and with the expanding highway program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. *If the Road Commissioner, under the facts of this case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are obvious and far-reaching.* It would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being.

2. These questions are equally important to the citizens of this State who by constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly it is important to the Federal Government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* 90% of the cost of the Interstate project here involved was paid for by the Federal Government. In the fiscal year 1961-62 the Road Commissioner spent approximately 30% of all funds spent by the State of West Virginia (Official West Virginia Blue Book, 1963, p. 953).

If the Road Commission and Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors so that the contractors are unable to secure an impartial adjudication of their rights under their contracts, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in

such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis this poses a wasteful drain upon funds provided for the purpose by both the State and Federal governments.

3. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both state action within the meaning of the Fourteenth Amendment *(Shelley* v. *Kraemer, McGhee* v. *Sipes*, 334 U.S. 1). Appellant's work, material and services already performed and incorporated into the public highway, and his rights under the contract are "property" with the protection of the due process and equal protection of law provision of the Fourteenth Amendment *(Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the states by the privileges and immunities clause of the Fourteenth Amendment *(West* v. *C. & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

4. This is a suit against the State Road Commissioner for wrongfully exceeding his authority, under color of office, and for failing to perform a statutory duty. The contract being with the Road Commission it was a necessary party to a declaration of the rights thereunder. The mere declaration of such rights does not constitute a suit against the State. Once these rights are judicially determined, it will be shown that the Road Commissioner failed to perform his statutory duty. Under the prayer for coercive relief, as permitted in West Virginia declaratory judgment procedure to be joined with the prayer for declaratory relief, the complaint sequentially asks that the Road Commissioner be compelled to perform his statutory duty. In this respect the holding of the lower court is in conflict with the decisions of this Court in *Roleton* v. *Crittenden*, 120 U.S. 390,

Payne v. *Central P. R. Co.*, 255 U.S. 228, *Ickes* v. *Fox*, 300 U.S. 82, *Board of Liquidation* v. *McComb*, 92 U.S. 531, and *Noble* v. *Union River Logging Company*, 147 U.S. 165, and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

5. *Mahone* v. *State Road Commission*, 99 W. Va. 397, 129 S.E. 320 decided in 1925 by the State Supreme Court, held that the statute authorizing the Road Commission to be sued was unconstitutional as violating the prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was absolute and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957 the Legislature nevertheless did not delete the consent to be sued, but on its reenactment reaffirmed its position that the Road Commission could sue and be sued, and thereby provided a legislative recognition of the requirements of due process.

The trial Court took the position that by virtue of the decisions of the State Supreme Court, the action as a declaratory judgment proceeding was per se an action against the State. It undertook then to consider it as a mandamus and held that by virtue of the affidavits there existed "substantial controversy of fact" and that mandamus would not lie. The trial Court's ruling in this respect, without the taking of evidence on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is in conflict with this Court's decision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196, and *Tindal* v. *Wesley*, 167 U.S. 204. Only after the preliminary question as to the rights of the parties had been decided, and the same decided against the Appellant can there come into play any claim of sovereign immunity.

6. The lower Court was of the opinion that the proceed-

ing was against the State in view of the fact that to compel the Road Commissioner to perform his statutory duties would set in motion a sequence of events which would ultimately result in the payment of money from the State Road Fund. This holding is contrary in principle to the decision of this Court in *Houston* v. *Ormes*, 252 U.S. 469.

The State Constitution by creating the State Road Fund separates and segregates the revenues from highway users to be expended solely for the construction and maintenance of highways, and expressly provides they will be used for "the *payment of obligations incurred in the construction*, reconstruction, repair and maintenance of *public highways.*" This is a special fund; it does not constitute a part of the general revenues; cannot be used for general purposes but only the purposes aforesaid; and the payments from which are not on debts of the State. (*State Road Commission* v. *O'Brien*, 140 W. Va. 114, 82 S.E. 2d 903). *The statutes expressly gives to the Road Commission the legislative authority to enter into highway construction contracts, and as part of that authority attached the condition it may be sued.* The statute also makes it mandatory for the Road Commissioner to audit the contractor's claims and issue his requisition for the payment of those found correct.

7. The Federal Government by furnishing participating funds for certain projects, the contracts for the construction of which are handled by the Road Commission, has utilized the Road Commission as its agent in the exercise of its constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

8. The State Supreme Court by its prior decisions holding the Legislature can never consent to a suit, imposed a stringency in excess of the common law doctrine of immunity. Under such holdings it is impossible to give con-

sent, although in fact the Legislature has consented to suits against the Road Commission. Whether such absolute immunity, in the light of the Legislature's granting such consent, is valid, regardless of whether the proceedings concern property taken for public use without compensation, is a question never passed on by this Court.

9. These federal questions are substantial to Appellant not only because of the extent of the property of which he has been deprived, but also because *the Road Commissioner's action has deprived him of the right to earn a livelihood in his chosen occupation.* Highway construction contracts are required to be bonded and *it is impossible for Appellant to secure the necessary bonds for any work as long as the Commissioner's action in abrogating his contract stands unresolved.*

10. On motion to dismiss, the allegations of Appellant's Complaint must be assumed to be true. The facts alleged are that the Road Commissioner, by refusing to certify Appellant's work has appropriated $1,338,511.67 of Appellant's property as incorporated in the public highway, without compensation to Appellant. *Appellant has been deprived of his property for public use, denied his compensation therefor, and refused the opportunity to establish his rights. Appellant has not had his day in Court, he has not had the due process of law.*

CONCLUSION

The questions presented on this appeal are of public importance, effecting both the State and Federal highway construction program, the highway construction industry and the broad spectrum of governmental morality. They involve the accountability of state officials and the delicate balance between the prerogative of governmental authority and the constitutional rights of the individual. Appellant submits that the precedents established by this Court do

not support the decision of the Circuit Court of Kanawha County but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

May 13, 1965

Respectfully submitted,

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APPENDIX A

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

Frank L. Taylor
Judge

November 7, 1963

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Gentlemen:

Re Howard Price, etc. vs. The State Road Commission of West Virginia, etc., et al

This case, which now comes on upon the amended and supplemental motions of the defendants to dismiss the complaint of the plaintiff, was submitted upon briefs and oral argument.

The complaint of the plaintiff is lengthy. It alleges that a contract between the State Road Commission and the plaintiff for the construction of a portion of a highway known as Interstate 64, in Cabell County, West Virginia, was entered into on August 12, 1960. The contract, which is an exhibit to the complaint, is lengthy in and of itself, and includes by reference the "Standard Specifications For Roads And Bridges" of the State Road Commission of West Virginia, adopted in 1952. It provides, in essence, that the plaintiff would, in two hundred fifty working days, complete what may be referred to as the excavation, grading and filling necessary for paving the section of road referred to therein. According to the allegations of the complaint the contract "was entered into upon the basis of unit prices for estimated or planned quantities * * * of items of work and material, as estimated and planned by the Road Commission, * * *." It is further alleged that the total *estimated* contract price is based on estimated quantities and was in the amount of $1,352,235.48. The complaint further alleges that "the total estimated contract (was) subject to being adjusted on the basis of the agreed unit prices for the quantities actually required."

The complaint is replete with allegations which indicate the exercise of discretion by the defendants, and alleges that the project will require more work than was originally contemplated. The complaint and the exhibits filed therewith indicate that there were items of disagreement between the plaintiff and the defendants, and the allegation is made that

the Road Commission has declared the contract in default. It is further alleged that following this action there was a conference between the Road Commissioner and the plaintiff but that as a result of the conference no amendment of the default order was made and the job was shut down by the defendants. It is further alleged that the project was evaluated by a firm of consulting engineers, and thereafter the balance of the work to be performed was put out to bid and the low bid received for the completion thereof was in the amount of $1,037,855.02.

The complaint further alleges that the Road Commission, the Road Commissioner and the Construction Director of the Road Commission are without authority to declare the default, and without authority to withhold from the plaintiff the sum of money first mentioned, it being claimed by the plaintiff that this is the value of the work which he has done.

The complaint prays for a declaratory judgment declaring that the contract is not in default, that the plaintiff has the right to proceed with the performance of the contract, and that the Road Commissioner be required to certify the performance of the quantities of work which are complete and unpaid. The complaint also prays for coercive relief in addition to the declaratory relief in the following particulars:

1. That the defendants be compelled to cancel and set aside any and all records which may show the contract in default;

2. That the defendants be compelled to perform their duty and certify to the State Auditor the amount of work already performed by the plaintiff and the amount due therefor;

3. That the defendants be compelled to return a project engineer to the job in order that the plaintiff may proceed

with the work and that the defendants be restrained from interfering with the plaintiff in his return to work; and

4. That the defendants be enjoined from letting any other or further contract for the balance of the work to be performed on the project.

It will thus be seen that the complaint prays for various judgments of this Court upon matters which involve discretion upon the part of the defendants, as well as relief relating to the statutory requirement (Code, 17-3-4) that claims of contractors "shall be audited by the commissioner and, if found correct, the commissioner shall issue the commission's requisition upon the auditor of this state therefor * * *."

The defendants have filed their amended and supplemental motions to dismiss, which motions raise three issues:

1. That the individual defendants comprising the State Road Commission of West Virginia have no authority or jurisdiction perforce Code, 17-3-4, as amended by the Acts of the 1963 Legislature, with reference to construction contracts or contractor's claims, or to the issuance of requisitions upon the State Auditor.

2. That the State Road Commission, the State Road Commissioner, the members of the State Road Commission, and the Director of the Construction Division, are all public officials or employees, and acting within the scope of their authority in the exercise of a governmental function with the conclusion drawn that the present action is an action against the State of West Virginia and within the inhibition of Article VI, Section 35, of the Constitution of West Virginia.

This ground of the motion also raises the subsidiary issues that this action is in effect an action to recover money from the State Road Commission; that the acts complained of by the plaintiff involve the exercise of discretion by the

defendants; and that the plaintiff has not exhausted his statutory remedies established for the prosecution of claims against the State by proceeding through the office of the Attorney General and the State Legislature.

3. That the complaint "fails to state a cause of action for which relief can be granted."

This motion was filed pursuant to R.C.P. 12(b); (1) and (6). In *Lugar and Silverstein, West Virginia Rules*, the following language is found at page 101:

> "In general a motion under Rule 12(b)(6) to dismiss the complaint, 'for failure to state a claim upon which relief can be granted,' corresponds to the demurrer under the old practice, * * *."

See also *1A Barron and Holtzoff, Federal Practice and Procedure*, §356. At page 355 of that text the following language is to be found:

> "The motion performs essentially the same function as the former demurrer in actions at law, and the motion to dismiss for want of equity in suits in equity, but is not limited by the technical requirements which attached to those ancient and now outmoded devices."

At page 369, the same volume, this language is to be found:

> "The motion should be determined upon allegations of the complaint and undisputed facts as they appear from pleadings, orders, and records of the case."

In this connection I call attention to the language of the motion in paragraph B-3 thereof, viz: "in reference to and behind the matters alleged by the plaintiff, all of which for the purposes of this motion alone *defendants do hereby deny*, * * *." (Emphasis supplied.)

It is obvious that upon such a motion as this the defendants cannot traverse the complaint. However, I shall treat the quoted language as surplusage and attempt to test the complaint by its allegations.

Counsel for the plaintiff argue that the inhibition of Article VI, Section 35, of the Constitution is not an absolute but, to the contrary, must be considered in the light of due process provisions of federal and state constitutions. It is true that the West Virginia Court has by its opinions broadened the scope of declaratory relief to the extent that now actions against public officials are entertained with more liberality than was formerly the rule. However, counsel for the plaintiff rely heavily upon *Douglass* v. *Koontz*, 137 W.Va. 345, and make the statement in their brief that this case is controlling of the issues arising in the case at bar. *Douglass* v. *Koontz* was a declaratory judgment suit brought against the State Tax Commissioner to determine whether or not the Business and Occupation tax imposed by Chapter 11, Article 13 of the Code was applicable to a given state of facts, and it was held therein that such an action was not a suit against the State within the inhibition of the West Virginia Constitution. The following broad language is to be found at page 351 of the opinion:

> "The question whether this proceeding comes within the inhibitory provisions of West Virginia Constitution, Article VI, Section 35, is narrow, and may be tersely stated as follows: Can a declaratory judgment suit be maintained against the state tax commissioner, where, as in the instant proceeding, the petition does not seek to obtain money or other property belonging to the State, *or to control the discretion of an official* or to compel the State, or an official thereof, to execute a contract on behalf of the State, but simply alleges that the statute does not apply to the taxpayer and asks for a declaratory judgment bearing directly and solely on that issue." (Emphasis supplied.)

Tested by the rule laid down by that case, I can only reach the conclusion that the allegations of the complaint coupled with the several prayers therein, state a cause of action which in large measure would seek to have this Court control the discretion of the defendants. This conclusion ap-

plies to paragraphs numbered 1 and 2 in the prayer for declaratory relief, and the paragraphs numbered 1, 3 and 4 in the prayer for coercive relief. To the extent defined here, the motion to dismiss will be sustained.

In the case of *Draper* v. *Anderson*, 102 W.Va. 633, the syllabi are as follows:

> "The performance by public officials of a plain statutory duty, not involving the exercise of discretion or judgment on their part, may be enforced by the writ of mandamus."
>
> "Under Section 28, Chapter 43, Code, providing that any claim of contractors for labor done or material furnished to the State Road Commission pursuant to the provisions of the act shall be audited by the Commission, and if found to be correct, the Commission shall issue its requisition upon the auditor therefor, the Road Commission may be compelled by mandamus, at the instance of contractors in cases not involving a substantial controversy of fact, to issue a requisition upon the auditor for labor performed by them in the construction of a State road under a contract with the State, by the Road Commission."

Based upon this authority, I am of opinion at this time to overrule the motion to dismiss in so far as it relates to paragraph 3 of the prayer for declaratory relief, to paragraph 2 of the prayer for coercive relief, and to the allegations supporting these prayers. If there be no substantial issue of fact with reference to the amount of work done by the plaintiff prior to the time the defendants closed down the job and declared the contract in default, then the auditing of the work which he has done and the payment therefor requires no exercise of discretion on the part of the Road Commissioner, and such relief may be granted in this action. Of course a final determination of this issue will depend upon the issues of fact which may be raised by a responsive pleading to the complaint.

A proper order in conformity herewith should be ten-

dered for entry promptly. The defendants will then be allowed ten days in which to answer those portions of the complaint which relate to the performance of the non-discretionary acts on the part of the defendants. The order to be tendered should make this letter memorandum of opinion a part of the record, and a copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX B

State of West Virginia.

THIRTEENTH JUDICIAL CIRCUIT

Charleston

April 13, 1964

Frank L. Taylor
Judge

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Gentlemen:

Re Howard Price, d.b.a. Howard Price & Company vs.
The State Road Commission of West Virginia, et al

This cause now comes on upon the defendants' motion for summary judgment and motion to dismiss the complaint for lack of jurisdiction, accompanied by the supporting affidavits of R. D. Bryant, Assistant Director of Construction

of the West Virginia State Road Commission, and Wilson W. Ward, Director of the Construction Division of the State Road Commission, and the opposing affidavit of the plaintiff, Howard Price; upon the plaintiff's motion to strike that portion of the defendants' answer designated "Answer Denying Jurisdiction"; and upon the defendants' motion to strike the plaintiff's counterclaim to the defendants' counterclaim, motion to dismiss the plaintiff's counterclaim for lack of jurisdiction, and for summary judgment on the plaintiff's counterclaim.

Counsel for the plaintiff contend that the affidavits submitted by the defendants may not be considered by this Court in the determination of the defendants' motion to dismiss the complaint for lack of jurisdiction. *Holnberg v. Williamson*, 135 F. Sup. 493, is cited for the proposition that consideration of a motion to dismiss must be confined to the pleadings. This rule, however, applies only to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). *Doherty v. Federal Stevedoring Co.*, 198 F. Sup. 191 (D.C.N.Y. 1961). It is stated in *2 Moore's Federal Practice*, 2nd Ed., §12.09, page 2256, that there has never been any substantial doubt as to the availability of a speaking motion to present defenses under Rule 12(b)(1)-(5). To the same effect is *1A Federal Practice and Procedure, Barron & Holtzoff*, §352, page 340:

> "Affidavits may be considered on a motion to dismiss for want of jurisdiction; on such a motion, unlike a motion to dismiss for failure to state a claim or a motion for summary judgment, the court may weigh the affidavits and other evidence to determine the existence or nonexistence of the requisite facts. Questions of jurisdiction over the subject matter are addressed to the court and are not triable by a jury."

Two illustrative Federal decisions employing this rule are *Nash-Kelvinator Corporation v. California Ref rigerator Repair Shop*, 11 F.R.D. 313 (D.C.Cal. 1950), holding that the

court may consider affidavits on a motion to dismiss an action for lack of jurisdiction without treating the motion as one for summary judgment, and *Williams* v. *Minnesota Mining & Manufacturing Co.*, 14 F.R.D. 1, (D.C. Cal. 1953), holding that the court may determine the jurisdictional facts from the affidavits and pleadings, grant the motion to dismiss on the basis of the facts so found, and at the same time, deny a motion for summary judgment because of a genuine issue as to a material fact. Therefore, since Rule 12(b), W.Va. R.C.P. is identical to Federal Rule 12(b), which is construed to permit speaking motions in determining jurisdiction, I am of opinion that the affidavits in this case may properly be considered in passing on defendants' motion to dismiss for lack of jurisdiction.

Without commenting on the propriety of instituting this action pursuant to the West Virginia Declaratory Judgment Act, governed by the new Rules of Civil Procedure, rather than by petition for writ of mandamus, excluded from the operation of the new rules, it must be recognized that the substantive right of a private individual or corporation to compel performance of a purely ministerial act by a public official under Code, 17-3-1 cannot be enlarged by the form or theory of the pleading instituting the action or proceeding. Therefore, the limitations of asserting a claim under Code, 17-3-1, heretofore prescribed and applied by the Supreme Court of Appeals of this State in mandamus proceedings, will be regarded as authority for a determination of the plaintiff's right in this case.

Objection is made to the defendants' motion to dismiss and motion for summary judgment on the ground that they are repetitions of defendants' previous motion to dismiss. It is the plaintiff's contention that the reassertion of the motion to dismiss and the motion for summary judgment, accompanied by the affidavits in support thereof, are prohibited by Rule 12(g), R.C.P. I do not so construe Rule 12(g). The rule speaks of waiver in situations where the

"defense" or "objections" are omitted, rather than the form or manner in which the objection is made. In this case the defense of lack of jurisdiction was properly raised in the former motion to dismiss. The rules do not prevent subsequent filing of motions to dismiss and for summary judgment where such motions are not interposed merely for delay purposes.

It is also argued by counsel for the plaintiff that the question of jurisdiction is moot because the assertion of the defendants' counter-claim constitutes a waiver of immunity. Counsel relies upon *State* v. *Ruthbell Coal Co.*, 133 W.Va. 319, and *Road Commission* v. *Ball*, 138 W.Va. 349, as authority for the proposition that the assertion of a counterclaim by the State Road Commission constitutes a waiver of the constitutional immunity from suit and exposes the defendants to liability for any cause arising out of the construction contract. *Road Commission* v. *Ball*, *supra*, is not, as I construe it, authority for the proposition that an unliquidated counterclaim may be asserted against the State Road Commission. Although the first Syllabus point states that a defendant, in a tort action instituted by The State Road Commission, cannot recover "* * * unliquidated damages in *excess* of the amount charged in the plaintiff's declaration." (Emphasis supplied), which might possibly be construed as opening the door to counterclaims not in excess of the amount charged by the plaintiff, the text of the opinion rejected the unliquidated counterclaim on the waiver theory, stating that the counterclaim in tort constitutes a suit against the State, prohibited by Section 35, Article VI, West Virginia Constitution. It is also pointed out in that decision that in the *Ruthbell Coal Company* case, the counterclaim was liquidated, grew out of the transaction giving rise to the plaintiff's claim, that no affirmative relief was sought by defendant, and that the State had no direct or monetary interest in the fund involved. In view of the disparity of situations between the *Ruthbell* case and the case at bar, I am of opinion that the counterclaim asserted

by the State Road Commission does not constitute a waiver of its constitutional immunity.

The most perplexing issue involved in this case is the constitutional immunity question, raised by defendants' motion to dismiss for lack of jurisdiction, such motion being supported by the affidavits of R. D. Bryant and Wilson W. Ward, and opposed by the affidavit of the defendant Howard Price. It is the contention of the defendants that the plaintiff's claim involves numerous controversies, disputes of fact, differences of interpretation and opinion between the parties, and involves the exercise of discretion by the defendants, and may not, therefore, be enforced by coercive relief.

In ruling on the defendants' previous motion to dismiss plaintiff's complaint, by letter memorandum of opinion dated November 7, 1963, I overruled the motions as to the third paragraph of the prayer for declaratory relief, and the second paragraph of the prayer for coercive relief, primarily upon the authority of *Draper* v. *Anderson*, 102 W.Va. 633, construing Code, 17-3-4, stating in the two syllabi:

> "The performance by public officials of a plain statutory duty, not involving the exercise of discretion or judgment on their part, may be enforced by the writ of mandamus."
>
> "Under Section 28, Chapter 43, Code, providing that any claim of contractors for labor done or material furnished to the State Road Commission pursuant to the provisions of the act shall be audited by the Commission, and if found to be correct, the Commission shall issue its requisition upon the auditor therefor, the Road Commission may be compelled by mandamus, at the instance of contractors in cases not involving a substantial controversy of fact, to issue a requisition upon the Auditor for labor performed by them in the construction of a state road under a contract with the State, by the Road Commission."

However, the introduction of the affidavits requires a re-

examination of this Court's authority to assume jurisdiction of this case. Without resorting to a protracted comparison of each and every claim of plaintiff with the statements in defendants' affidavits concerning those claims, it would appear to be a fair statement of the undisputed facts to say that the entire claim of the plaintiff, and each item thereof, involves some substantial dispute, either as to the quantity or quality of the work done, or to the plaintiff's right to compensation for the work performed under the terms of the contract, or both. It should be noted at this point that paragraph six of the reply affidavit does not effectively contradict any of the statements in the defendants' affidavits since that sentence is merely a conclusion containing no specific averments of fact. The factual situation in *Draper* v. *Anderson*, *supra*, appears to be significantly different from the facts demonstrated by the affidavits in this case. In the *Draper* case, where the work was completed by the petitioner and accepted by the State Road Commission as fully complying with the terms of the contract, the concluding paragraph of the opinion states:

> "As the record does not in our opinion present any substantial issue of fact, and the position of the respondents not being justified as a matter of law under the terms of the contract, the peremptory writ will be awarded."

In *State* v. *Road Commission*, 108 W.Va. 41, in refusing a writ of mandamus to compel the State Road Commission to execute a requisition upon the State Auditor for work performed in the construction of a roadway, Judge Maxwell, in the majority opinion, makes the following observations of the *Draper* decision:

> "Our case of *Draper* v. *Anderson, et al*, 102 W.Va. 633, relied on by relators, does not sustain the position of relators in this particular. It is there held 'that * * * the Road Commission may be compelled by mandamus, at the instance of the contractors in cases not involving a substantial controversy of fact, to issue a requisition

upon the auditor for labor performed by them in the construction of a state road under a contract with the State, by the Road Commission.' Clearly, the 'labor performed by them * * * under a contract' there referred to, is labor for which the contractors are to be paid under the terms of the contract,—not labor as to which there may be a legal question as to whether the contract contemplates compensation to the contractors. The *Draper* case only went to the extent of holding, as declared in syllabus one, that 'The performance by public officials of a plain legal duty, not involving the exercise of discretion or judgment on their part, may be enforced by writ of mandamus.' The converse is necessarily true. Where there is not a plain statutory duty to be performed mandamus will not lie. * * *."

There are numerous decisions by our Supreme Court of Appeals uniformly holding that before mandamus will lie to control the official acts of an individual or commission created by the State, the petitioner must show a clear legal right to the relief sought. *State ex rel. Dunn* v. *Griffith*, 139 W.Va. 594; *Childers* v. *State Road Commissioner*, 124 W. Va. 250; *State ex rel. Conley* v. *Pennybacker*, 131 W.Va. 442; and *State ex rel. Fox* v. *Board of Trustees*, The Syllabus Service, Supreme Court of Appeals of West Virginia, March 17, 1964. And where discretion is involved in the doing of an act or the refusal to act, the exercise of such discretion may not be controlled by mandamus. *Heavner* v. *State Road Commission*, 118 W.Va. 630; and *Reynolds* v. *State Road Commission*, 111 W. Va. 398.

While the requirement of clear legal right may seem harsh when applied to certain isolated situations, the necessity of the rule lies in the recognition of the very basic principle that the legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected. *Article V, Section 1, Constitution of West Virginia*; and *State ex rel. Brotherton* v. *Blankenship*, 83 W.Va. 302. In the very recent decision in *Cunningham* v. *County Court of Wood County*, 134

S.E. 2d 725 (W.Va. 1964), Judge Calhoun made the following observations:

> "Section 21 of Article VIII of the Constitution provides that the common law shall continue in force in this state 'until altered or repealed by the Legislature.' Similar language has been a part of the statutes of this state throughout the years of its existence. Code, 1931, 2-1-1. This Court, therefore, is sternly and unmistakenly enjoined to leave drastic changes in the common law to the legislative branch of the state government. Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

In view of the fact that the ultimate relief sought by plaintiff is the payment of money out of the treasury of the State Road Fund for claims uncontrovertedly shown to involve substantial controversies of facts by the affidavits, I am of opinion to sustain the defendants' motion to dismiss the complaint for lack of jurisdiction.

Finally, the counterclaim of the defendants, being asserted only under the protest that this Court has no jurisdiction of the plaintiff's claim, will be dismissed without prejudice.

A proper order in conformity herewith should be tendered for entry promptly, making this letter memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX C

Chapter 26, Acts of the West Virginia Legislature, Regular Session, 1941, p. 152, entitled "Uniform Declaratory Judgments Act", being Chapter 55, Article 13 of the Code of West Virginia, 1931, as Amended; Same, Michie's Code of 1961 (Serial Sections 5816(1) to (16)) p. 1151)

Section 1. POWERS OF COURTS TO DECLARE RIGHTS, STATUS AND OTHER LEGAL RELATIONS.—Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Section 2. WHO MAY HAVE DETERMINATION AND OBTAIN DECLARATION.—Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 3. CONSTRUCTION OF CONTRACT BEFORE OR AFTER BREACH.—A contract may be construed either before or after there has been a breach thereof.

Section 4. DECLARATION CONCERNING TRUSTS AND ESTATES.

. . .

Section 5. ENUMERATION NOT RESTRICTION.—The enumeration in sections two, three, and four does not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory

relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Section 6. WHEN COURT MAY REFUSE JUDGMENT OR DECREE. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Section 7. REVIEW OF ORDERS, JUDGMENTS AND DECREES.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees.

Section 8. FURTHER RELIEF ON PETITION; SHOWING BY ADVERSE PARTY.—*Further relief based on a declatory judgment or decree may be granted whenever necessary or proper.* The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith (Italics supplied).

Section 9. ISSUES OF FACT; TRIAL AND DETERMINATION.—*When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.* (Italics supplied).

Section 10. AWARD OF COSTS.

* * *

Section 11. PARTIES TO ACTION; MUNICIPAL ORDINANCE OR FRANCHISE INVOLVED.

* * *

Section 12. ARTICLE REMEDIAL; LIBERAL CONSTRUCTION AND ADMINISTRATION. This article is

declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Section 13. "PERSON" DEFINED.

* * *

Section 14. PROVISIONS SEVERABLE; EXCEPTIONS.

* * *

Section 15. INTERPRETATION AND CONSTRUCTION.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Section 16. CITATION OF ARTICLE.—This article may be cited as the "Uniform Declaratory Judgments Act."

APPENDIX D

WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD

Adopted and promulgated by order of the Supreme Court of Appeals of West Virginia entered October 13, 1959, effective on and after July 1, 1960, and as contained in 144 W. Va. Reports, p. xcviii.

* * *

RULE 57

DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgment Act, Code, Chapter 55, Article 13, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. *The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action* or upon petition to any court in which the declaratory action might have been instituted. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (Italics supplied).

* * *

APPENDIX E

HOWARD PRICE d/b/a
HOWARD PRICE & CO.

vs. Civil Action No. 3479

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, et al.

On days heretofore this cause came on to be heard on:

a. Defendants' motion for extension of time to answer;

b. Defendants' motion to dismiss the complaint for lack of jurisdiction and motion for summary judgment for lack of jurisdiction, each accompanied by supporting affidavits;

c. Defendants' answer, answer denying jurisdiction, and counterclaim;

d. Plaintiff's opposition in open court to defendants' motion for extension of time, and motion in open court to strike defendants' motions to dismiss for lack of jurisdiction and for summary judgment;

e. Plaintiff's reply affidavit in opposition to defendants affidavits;

f. Plaintiff's reply to defendants' answer, motion to strike defendants' answer denying jurisdiction, and counterclaim to defendants' counterclaim; and

g. Defendants' motion to dismiss for lack of jurisdiction and for summary judgment addressed to plaintiff's counterclaim to defendants' counterclaim;

and upon all of the previous pleadings, motions and papers filed herein and upon the briefs and arguments of counsel.

Whereupon the Court took time to consider its decision and after mature deliberation and collective consideration of the above pending motions and pleadings, is of opinion

to, and doth hereby, SUSTAIN the defendants' motion to dismiss the complaint filed herein for lack of jurisdiction, for the reasons expressed in a letter memorandum of opinion of the Court dated April 13, 1964, which letter memorandum of opinion is ORDERED to be, and is hereby, filed herein as a part of this order and made a part of the record of this cause.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. Plaintiff's complaint be, and it is hereby, dismissed;

2. Defendant's counterclaim, having been asserted only under protest that this Court has no jurisdiction of plaintiff's action, be and it is hereby, dismissed without prejudice; and plaintiff's counterclaim to defendants' counterclaim be, and it is hereby, dismissed without prejudice;

3. Defendants be, and they are hereby, awarded judgment against the plaintiff for their costs in their own behalf expended and a statutory fee of ten dollars.

To all of which action of the Court the plaintiff does object and except for the following reasons:

1. The Court's ruling denies plaintiff the rights guaranteed to him under Sections 9, 10 and 17, Article III of the Constitution of West Virginia.

2. *The Court's ruling denies plaintiff the rights guaranteed to him* under Section 10, Article I of the Constitution of the United States, and *under Section 1, Article XIV of the Amendments to the Constitution of the United States.* (Italics supplied)

3. The construction of a public road under contract to a private person is not a governmental function within the prohibition of Section 35, Article VI of the Constitution of West Virginia.

4. *Plaintiff's action* is not a suit against the State of

West Virginia within the prohibition of Section 35, Article VI of the Constitution of West Virginia, but is *an action to declare plaintiff's rights and compel the performance of a statutory duty by the defendant Burl A. Sawyers as State Road Commissioner.* (Italics supplied)

5. *The controversy of fact appearing on the pleadings does not establish a lack of jurisdiction under Section 35, Article VI of the Constitution of West Virginia.* (Italics supplied)

6. *The Court has jurisdiction to hear evidence to determine its jurisdiction, and on defendants' allegation that the action was a suit against the State and there is a dispute of fact, such jurisdiction can be determined only by evidence taken.* (Italics supplied)

7. On a dispute of fact appearing on the pleadings under a defense of the State's immunity, plaintiff was entitled to have evidence taken to establish his right by clear and convincing proof.

8. For such other reasons as may be later assigned by plaintiff.

ENTER:

FRANK L. TAYLOR
Judge

May 19, 1964
Inspected by:
LEE M. KENNA
Counsel for Defendants

CARNEY M. LAYNE
CHARLES W. YEAGER
Counsel for Plaintiff

APPENDIX F

Pertinent State Constitutional Provision

Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding the following new section:

ARTICLE VI

* * *

REVENUES APPLICABLE TO ROADS

§52. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deductions of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and *used solely for construction*, reconstruction, repair and maintenance of *public highways*, and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, *and the payment of obligations incurred in the construction*, reconstruction, repair and maintenance *of public highways*. (Italics supplied)

APPENDIX C

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto b ythe official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

Section 1. *There shall be a state road fund, which shall* consist of the proceeds of . . . When any money is collected from any of the sources aforesaid, it shall be paid into the state treasurer by the officer whose duty it is to collect and account for the same, and *credited to the state road fund, and shall be used only for the purposes named in this chapter, that is to say;* (a) To pay the principal and interest due on all state bonds issued for the benefit of said fund, and set aside and appropriated for that purpose; (b) to pay the expenses of the administration of the road department; (c) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all primary roads;* (d) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all secondary roads.* * * * (Chapter 3, Acts of the Legislature of West Virginia, 2d Extraordinary Session, 1933, p. 7; Chap. 17, Art. 3, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1449(1)), p. 873). (Italics supplied)

§2. COST OF CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT AND MAINTENANCE OF STATE ROADS.—*The cost* and expense *of the construction,* reconstruction, improvement or maintenance *of all state roads shall be paid out of any moneys received by* or appropriated to *the state road commission for that purpose* (Chapter 17, Article 3, Section 2,

Official Code of West Virginia, 1931, p. 390; Same, Michie's Code of West Virginia 1961, (Serial Section 1450), p. 874.) (Italics supplied).

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor* or others, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission,* pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the commission's requisition upon the auditor of the State therefor,* showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; Chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia 1961, 1964 Cumulative Supplement, (Serial Section 1452), p. 171.) (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR. —*All work of construction* * * * *of state roads* * * *, *and the furnishing of all materials and supplies therefor* * * * *shall be done and furnished pursuant to contract* * * * (Chapter 143, Acts of the Legislature, Regular Session, 1957, p. 687; Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code of 1961 (Serial Section 1474 (1) (p. 880). (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.— * * * (Chapter 3, Acts of the West Virginia Legislature,

Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code of 1961 (Serial Section 1474(2) p. 881).

Section 21. FORM OF CONTRACT; SIGNING.— • • • (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia, 1961 (Serial Section 1474(3) p. 882).

APPENDIX H

ORDER CERTIFYING EXISTENCE OF FEDERAL QUESTIONS

On motion of the Plaintiff, Howard Price, d/b/a Howard Price and Company, this Court, in addition to the orders made herein, orders it to be and it hereby is certified and by this order made a part of the record in this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments, made in this Court on behalf of the Plaintiff, upon Defendants' motions to dismiss, it was insisted and relied upon by said Plaintiff, that the application of Section 35, Article VI of the Constitution of West Virginia, to this case would deprive Plaintiff of his property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution; and it became material and necessary to the determination of this case by this Court to determine this question so raised by the Plaintiff, and that this Court found that such Constitutional rights of Plaintiff would not be violated by sustaining Defendants' motion to dismiss, and the questions were determined adversely to said Plaintiff as appears from the entry of the final order of dismissal made herein.

This Court further orders it to be, and it is hereby certified and by this order made a part of the record in this case, that the petition to the Supreme Court of Appeals of West Virginia, from the final order of this Court, having been refused, that this is the highest Court in the State of West Virginia in which a decision could be had.

All of which is accordingly ADJUDGED and ORDERED,

and the Clerk directed to enter the within order and certificate in the Order Book of this Court.

ENTER:

FRANK L. TAYLOR
Judge of the Circuit Court
of Kanawha County, West Virginia

PRESENTED BY:
CHARLES W. YEAGER
of Counsel for Plaintiff

APPROVED:
BENJAMIN A. RITCHIE
of Counsel for S. R. C. et al

APPENDIX I

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HOWARD PRICE dba
HOWARD PRICE and COMPANY,
Plaintiff,

vs.

For Declaratory Judgment
and Coercive Relief
Civil Action 3479

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation; BURL A. SAWYERS, as STATE ROAD COMMISSIONER; WILSON H. WARD, as DIRECTOR OF THE CONSTRUCTION DIVISION, State Road Commission of West Virginia; and CHARLES M. HARRISON, LOUIS E. PETITTO, WILBUR S. JONES, HAL M. SCOTT, RALPH S. SHEPLER, W. H. HANKS, and JOHN E. FAULCONER, as Members of and Constituting the State Road Commission of West Virginia,
Defendants.

COMPLAINT

This action is brought pursuant to the West Virginia Uniform Declaratory Judgment Act, Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and in accordance with Rule 57 of the Rules of Covil Procedure, and the subdividing titles being placed for convenience of reference only, the plaintiff, Howard Price dba Howard Price and Company, says as follows:

THE DEFENDANTS

I

That the defendant The State Road Commission of West Virginia, hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2, of the Code of West Virginia, 1931, as amended; that the office of State Road Com-

missioner was created and exists under and by virtue of Chapter 17, Article 2A of the Code aforesaid; that the defendant Burl A. Sawyers, as State Road Commissioner of West Virginia, hereafter referred to as "Road Commissioner", has been duly appointed and is presently acting as such; that the defendant Wilson H. Ward, Director of the Construction Division of the State Road Commission, hereafter referred to as "Construction Director", has been duly appointed and is presently acting as such; that the office of Member of the State Road Commission of West Virginia is created and existing under and by virtue of Chapter 17, Article 2 of the Code aforesaid, and that Charles M. Harrison, Louis E. Petitto, Wilbur S. Jones, Hal M. Scott, Ralph S. Shepler, W. H. Hanks, and John E. Faulconer, hereafter referred to as "Commission Members", have been duly appointed and are presently acting as such; that by virtue of Chapter 17 of the Code aforesaid, the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor; that it is the duty of the Construction Director and Road Commissioner to certify to the Commission the performance of work done under contract and the amounts due thereunder; and by virtue of Chapter 17, Article 3, Section 4, of said Code, it is the duty of the Commission and Commission Members to audit the claims of contractors and for those found correct to issue requisitions upon the State Auditor for payment thereof.

THE CONTRACT

II

That the Road Commission, acting through Patrick C. Graney, the then Road Commissioner for the State of West Virginia, did after bid award, enter into a contract, hereafter referred to as "contract", with the plaintiff, Howard Price dba Howard Price and Company, for the grading and draining of a certain portion of the roadway known as Interstate Highway 64, located in Cabell County, West Vir-

ginia, and more particularly designated as Project Number I-64-1 (37) 22, Cabell County, hereafter referred to as "project", and which said contract is dated August 12, 1960; that the contract documents consist of (1) the contract instrument, (2) the contractor's proposal, (3) the Standard Specifications, Roads and Bridges, Of the State Road Commission of West Virginia, Adopted 1952, (4) the Special Provisions to said contract and amendments and revisions to said Standard Specifications, (5) the contract bond, and (6) the drawings and plans for said project, a copy of each of which, except the drawings and plans, is attached hereto and made a part hereof; Item 3, the Standard Specifications in book form being marked Exhibit 1, and Items 1, 2, 4 and 5 being in a single booklet and collectively marked Exhibit 2; that the plans and drawings are by reference made a part hereof, and will be tendered as Exhibit 3 upon the request of the Court or any party defendant hereto. That as required by statute and the contract, Plaintiff executed a bond for the faithful performance of said work with the United States Fidelity and Guaranty Company, a corporation, as Surety, hereafter called "Surety", and as a customary condition to obtaining said suretyship, Plaintiff executed the customary indemnification agreement with the Surety to the effect Plaintiff would save Surety from any loss.

III

That said contract was by bid, and was entered into upon the basis of unit prices for estimated or planned quantities, hereafter referred to as "estimated quantities," of items of work and material, as estimated and planned by the Road Commission, and the total estimated contract price, based on estimated quantities, was $1,352,235.48; that said estimated quantities are subject to the requirements of the project, being either more or less than estimated or planned, and the total estimated contract subject to being adjusted on the basis of the agreed unit prices for the quantities actually required.

IV

That said contract provides, among other things, as follows:

1. That the Road Commission would each month estimate the amount of work performed by Plaintiff and compute the value thereof from the unit prices, and after deducting Five (5) per cent retainage, pay Plaintiff therefor once a month for the work performed in the preceding month. (Contract, Paragraph 10)

2. That the Road Commission, subject to certain qualifications, would have the right to increase the quantities of work as may be necessary to complete the project, and that Plaintiff would perform any such item at the same price as that bid upon the original quantity. (Standard Specifications, Sec. 1.4.2., p. 12)

3. That for any item not included in the original contract there might be executed a supplemental agreement at a price therefor agreed by the parties as a fair and reasonable price. (Standard Specifications, Sec. 1.4.2, p. 12)

4. That the performance of all items of work would be under the supervision and control of the Road Commission through its Engineer, which Engineer is the said Wilson H. Ward by virtue of his position as Director of its Construction Division; and that the Road Commission would have the right to suspend work for various reasons, including failure of Plaintiff to obey and carry out orders of the Road Commission personnel. (Standard Specifications, Sec. 1.5.1, p. 16; Sec. 1.8.4, p. 31)

V

That each of the items of work covered by said contract included both the material concerned in said item and the work in putting said item in place, or as the case may be, in removing it from place, and that among, but not all, said items are the following:

1. Item 3-A, Borrow Excavation, the planned or estimated quantity of which, as determined by the Road Commission as necessary for said project, was 22,950 cubic yards, for which Plaintiff's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which borrow is earth material secured by the contractor from off the right-of-way, measured in the "cut" of its removal, and used on the right-of-way as fill material.

2. Item 125, Special Rock Fill, the planned or estimated quantity of which, as determined by the Road Commission as necessary for the project, was 278,111 cubic yards, for which Plaintiff's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which special rock fill is rock secured by the contractor either on or off the right-of-way, and which is measured in the "fill" (which is in place on the roadway) and used on the right-of-way as fill material of special quality.

3. Item 2, Unclassified Excavation, the planned or estimated quantity of which, as determined by the Road Commission as necessary for the project, was 1,525,000 cubic yards; for which Plaintiff's bid and contract price was Forty-Nine Cents (49¢) per cubic yard; and which unclassified excavation is material cut from the roadway area and measured in the "cut" of its removal, and when suitable, is used in the fills, and if unsuitable, is "wasted," that is, disposed of off of the project.

4. The following miscellaneous items of the following estimated quantities and bid prices:

ITEM NO.	DESCRIPTION	ESTIMATED QUANTITY	UNIT BID PRICE
6A	Structure Excavation	19,263 CY	$ 2.25
71	Class A Concrete	891 CY	55.00
107	Cr. Stone, Sand or Gravel for Underdrain	2,322 CY	7.50
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	8,509 Tons	4.50

127A	Maintaining Traffic	Lump Sum	5,000.00
131C	Temporary Fence	8,500 LF	.15
136	Engineer Field Office	Lump Sum	3,000.00
138	Construction Layout Stakes	Lump Sum	10,000.00
42-c	24" Paved Invert CMP 14 GA	4,946 LF	6.75

CONDITIONS UNDER WHICH PERFORMANCE OF CONTRACT WAS HAD

VI

Plaintiff says that on or about September 6, 1960, he commenced the performance of work under said contract and on September 11, 1962, at the time his work was terminated by the Road Commission, he had performed approximately Eighty Per Cent (80%) of the original contract plus overruns. That the supervision and control of Plaintiff's work was under the Project Engineer (who reported to the Area Engineer), the Area Engineer (who reported to the Assistant District Engineer), the Assistant District Engineer (who reported to the District Engineer), the District Engineer (who reported to the Construction Director), the Regional Engineer (who also reported to the Construction Director), and the Construction Director of the Road Commission itself; that for some time prior to November 1961, Plaintiff was receiving direct from the various echelons of the Road Commission engineering personnel, contradictory and confused directions and orders, which directions and orders were under threats, express and implied, of work suspension for non-compliance, until matters reached such stage that Plaintiff did not know whose directions to follow; that through said period and due to the delays of the Road Commission personnel, it was impossible to satisfactorily proceed, and Plaintiff's equipment and work force were unable to work effectivaly on the project; that at the request of the Construction Director, the project was closed down

on or about November 1961 until the matters could be straightened out; that the project continued to be closed down until the latter part of April 1962; that shortly before the work resumption in the latter part of April 1962, at a conference held on April 4, 1962, it was agreed that Plaintiff would blend with borrow the silty material hereafter referred to in Paragraph XIII, remove certain portions of the special rock fill, with reservation of his rights thereunder, as referred to in Paragraph X, and proceed with several minor items, all as set forth in the letter dated April 16, 1962, from Plaintiff to the District Engineer of the Road Commission confirming such, a copy of which letter is attached hereto marked Exhibit 4, and the Road Commission agreed that it would take the necessary steps to immediately pay Plaintiff for the borrow, referred to in Paragraph VIII; that Plaintiff proceeded according to each particular of his agreement under the direction and supervision of Road Commission personnel, and to their complete satisfaction, until he had reached the point in the orderly progress of work and proper sequence of performance, where he had to borrow more material to place in the fill and be allowed by the Road Commission onto the adjoining project to obtain more special rock fill, and again Plaintiff was delayed by the inaction of the Road Commission and its personnel, and his equipment and work force were unable to work effectively while awaiting their decisions.

BORROW EXCAVATION

VII

That said 22,950 yards of borrow as originally estimated by the Road Commission was insufficient for the completion of the project, and Plaintiff says that the project will require approximately 190,835 cubic yards; that the Road Commission further determined that additional material of a borrow nature was required, which it classified as random borrow, an item of material not listed in the contract, and

the Road Commission estimated the amount of random borrow required as being approximately 35,000 cubic yards, and that the Road Commission and Plaintiff agreed that a fair and reasonable price therefor was the sum of $1.50 per cubic yard.

VIII

That in the spring of 1961, Plaintiff advised the Road Commission that the borrow required would exceed the estimated quantity, and the Road Commission through the Construction Director, on October 6, 1961, did prepare a change order increasing the estimated quantity of borrow, and did forward same to the Plaintiff, that said change order was signed by Plaintiff and his Surety and returned to the District Engineer, and thereafter forwarded to the Construction Director; that after said order was received by the Construction Director, he prepared another in its place for the stated reason some change was required in the contents and such new change order was forwarded down, signed by Plaintiff, his Surety, and the District Engineer, and returned to the Construction Director, where again the same action was repeated and the same sequence of events followed, and the Plaintiff signed approximately five such change orders, all covering the matter of quantity of borrow, the last of which change orders was dated July 6, 1962, a copy of which is attached hereto marked Exhibit 5 and made a part hereof; that a short time previous to the time of the last change order on borrow the said Construction Director also prepared and sent to Plaintiff a supplemental agreement on random borrow; which agreement provided for a price of $1.50 per cubic yard as agreed upon between the Road Commission and Plaintiff, and which supplemental agreement was on June 15, 1962 likewise signed by Plaintiff, his Surety and the District Engineer, and returned to the Construction Director; that said Construction Director during the period covered by the execution of the change orders did not furnish Plaintiff a signed copy of

any of the change orders for the stated reason a new and superseding one was to be issued, and in the summer of 1962 shortly before and at the time of the alleged default, refused to furnish Plaintiff any signed copy of a change order or a signed copy of the supplemental agreement on random borrow.

IX

That after the execution of said first change order by Plaintiff, his Surety, and the District Engineer, Plaintiff was directed by the Construction Director to borrow in excess of the originally estimated quantity and to place the additional amounts in the roadway, which Plaintiff did and continued to do, according to the specifications, as necessary for the roadway construction, and under the inspection and at the insistence of the Road Commission, and that he has placed therein approximately 69,975 cubic yards of borrow in addition to the estimated quantity of 22,950 cubic yards, of value at bid price in the amount of $64,377.

SPECIAL ROCK FILL

X

The item of special rock fill was to be placed in three locations upon the roadway project, the only one here pertinent being the east side of Mud River where it crosses the right-of-way; that Plaintiff secured sources of material suitable for special rock fill, and while to Plaintiff's knowledge no test of suitability of special rock fill is required other than visual inspection, nevertheless the Road Commission had said material examined by laboratory analysis, found it suitable, and approved it for use as special rock fill, a copy of the laboratory reports on which, and letter from Smokey Ball, Project Engineer, are attached hereto, collectively marked Exhibit 6 and made a part hereof; that on November 4, 1960, Plaintiff commenced the performance of this item and placed said special rock fill at the locations called for, with the approval and under the direction and

supervision of the Road Commission personnel; that the performance of said work was included in the monthly estimates, certified by the Construction Director and Road Commissioner to the Commission and Commission Members, approved for payment, and paid for by the Road Commission; that after approximately 100,000 cubic yards of this item had been so placed by Plaintiff, the Road Commission informed Plaintiff a part thereof in the fill on the east side of Mud River was not suitable for special rock fill, and under threat of suspending work on the project for non-compliance, directed Plaintiff to remove 51,442 cubic yards thereof; that after objection and reserving his rights (see Exhibit 6 herewith), Plaintiff on the Road Commission's express direction, removed said 51,442 cubic yards; that after the removal of said rock, the Road Commission, on the next monthly estimate received by Plaintiff, deducted from the amount due Plaintiff for other items of work performed by him, the sum of $37,038.24, representing the 51,442 cubic yards of special rock fill for which the Road Commission had previously paid and then required Plaintiff to remove it. That the cost of said removal of said rock is in excess of the cost of its placement, and a reasonable price for such removal is $2.00 per cubic yard, for a total sum of $102,884, and that Plaintiff claims under the contract he has a right to be paid said said sums of $37,038.24 and $102,884. That Plaintiff placed a total of 160,103 cubic yards of special rock fill, not including the 51,442 cubic yards placed and removed as aforesaid; that of such 160,103 cubic yards, Plaintiff has been paid for 123,558 cubic yards only; that Plaintiff has not been paid for the balance of 36,545 cubic yards, which at bid price is of the value of $26,312.40, and that he has a right to be paid said sum of $26,312.40.

XI

That to replace the said 51,442 cubic yards removed from the special rock fill, and to complete the special rock fill, the Road Commission by laboratory analysis approved

certain material located partly on and partly off the adjoining highway project, hereafter referred to as "Robertson-Fowler project"; the quantity which was partly off said adjoining Robertson-Fowler project being accessible only from said adjoining project, which approval is evidenced by Report on Sample, Laboratory No. 100399, a copy of which is attached hereto marked Exhibit 7; and the Road Commission agreed that it would make a partial acceptance of the roadway area and agreed that Plaintiff could traverse such part of said roadway area to secure the material, which is usual and customary procedure; that notwithstanding said agreement, in the summer of 1962, when the contractor on the Robertson-Fowler project completed the phases of work necessary to allow Plaintiff to traverse part of the roadway to the material source, the Road Commission took no steps to accept said phases of work, although often requested to do so by Plaintiff.

UNCLASSIFIED EXCAVATION AND BLENDING

XII

That upon the direction and order of the Road Commission, Plaintiff was required at various places to excavate below the rough grade line so as to reach stable material, which excavation increased the planned quantity of unclassified excavation; that Plaintiff excavated a total of 1,676,369 cubic yards of unclassified excavation, and has been paid for 1,377,570 cubic yards thereof; that Plaintiff has not been paid for the balance of 298.799 cubic yards, which at bid price is of the value of $146,411.51, and that Plaintiff under said contract claims he has a right to be paid said $146,411.51.

XIII

That upon the direction and order of the Road Commission personnel, under threat of shut-down for non-compliance, Plaintiff was required to place material from unclassified excavation which was silty, of high water

absorption and without compaction, in said fill; that the Road Commission, perceiving the fill would lack suitability, then required Plaintiff to place suitable material in the fill, and, attempting to give such material some binding and compacting quality, directed and ordered Plaintiff, under threat of shut-down for non-compliance, to blend the silty material with suitable material, either unclassified excavation and suitable for fill, or with borrow secured from off the project. That said blending operation or manipulation was not an item in the contract, but is a pay item paid for by the Road Commission as a separate item, the reasonable and fair price of which is Fifty (50) Cenats per cubic yard; and that Plaintiff was compelled to blend approximately 312,600 cubic yards of a total value of $156,300.00, and that Plaintiff claims under the contract that he has a right to be paid the sum of $156,300.00.

EQUIPMENT RENTAL AND OTHER EXPENSE
XIV

That during the numerous delays and after the project was closed down in November 1961, and after resumption of work in April 1962, and during the further delays occasioned by the Road Commission's failure to provide a borrow change order as alleged in Paragraph VIII and its failure to accept the portion of the Robertson-Fowler project so Plaintiff could secure special rock fill, as alleged in Paragraph XI, much of Plaintiff's equipment and work force were unable to work effectively; that by letter of November 6, 1961 to the District Engineer, copy of which is attached hereto marked Exhibit 8, the Road Commission was notified of Plaintiff's charge for equipment rental and other expenses and that he did not expect to be charged with working time for the periods in which he had been delayed by the Road Commission; that the equipment rental and stand-by expense is part of the cost of said project, and is a separate item customarily paid for by the Commission, and that the cost of such equipment rental is

$681,881.57, and the cost of other stand-by expense is approximately $95,000; and that Plaintiff claims he has a right to be paid said sums of $681,881.57 and approximately $95,000.

MISCELLANEOUS ITEMS PERFORMED AND UNPAID
XV

The following miscellaneous items, as referred to in Paragraph V, Subparagraph 4, have been performed by Plaintiff in the quantities indicated; that all of the quantities are within the estimated quantities, and which at bid price are of the values as indicated, and that Plaintiff has not been paid the sums due for the quantities indicated:

Item No.	Description	Unit Bid Price	Total Quant. Performed	Quantity Unpaid	Amount
6A	Structure Excavation	$ 2.25 CY	13,166 CY	3,216	7,236.00
71	Class A Concrete	55.00 CY	891 CY	16	880.00
107	Cr. Stone, Sand or Gravel for Underdrain	7.50 CY	1,045 CY	486	3,645.00
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	4.50 Ton	8,509 Tons	459	2,065.50
127A	Maintaining Traffic	Lump Sum 5,000.00	100%	100%	5,000.00
131C	Temporary Fence	.15 LF	8,500 LF	2,433	364.95
136	Engineer Field Office	Lump Sum 3,000.00	100%	33-1/3%	999.00
138	Construction Layout Stakes	Lump Sum 10,000.00	100%	30%	3,000.00
42-c	24" Paved Invert CMP 14 GA	6.75 LF	2,031 LF	1,064	7,182.00

Plaintiff claims that under the contract he has a right to be paid the sums so indicated totaling $38,306.95.

THE ALLEGED DEFAULT

XVI

In July 1962, the District Engineer and Road Commissioner advised Plaintiff the progress on the work was not satisfactory to them, and noted six matters which Plaintiff says were not valid objections to the progress of his work, and the Road Commissioner threatened to take the project from Plaintiff; by letter dated July 23, 1962, Plaintiff replied, showing that said six matters were not valid objections, a copy of which letter is attached hereto marked Exhibit 9, and to which reference is made for full details of the reply; and as appears therefrom, all of the Road Commission's objections were without substance; that by letter dated August 21, 1962, the Road Commissioner notified Plaintiff the Road Commission had defaulted his contract, on the alleged grounds Plaintiff "has delayed, neglected and defaulted . . . to commence the performance and completion of the work", a copy of which letter is attached hereto, marked Exhibit 10; that at Plaintiff's request the Road Commissioner shortly thereafter held a conference, at which time the Road Commission flatly refused to take the necessary steps to secure to Plaintiff payment for the borrow which the Commission had previously directed Plaintiff to place in the project, and forbade him to do any of the other items of work which it was Plaintiff's right to prosecute; and to the end that the Road Commission might possibly rescind the notice of alleged default, demanded that Plaintiff forthwith proceed with replacing special rock fill which it ordered him to remove; that Plaintiff then agreed that with the Project Engineer he would recanvass the locality to determine if any other material sources were available and acceptable to the Road Commission for special rock fill; and the Road Commission agreed it would take immediate steps to expedite the accept-

ance of a portion of the adjoining project so that special rock fill could be obtained therefrom, and that another conference would be held as soon as Plaintiff had canvassed the locality; that Plaintiff canvassed the locality with the Project and samples were taken from further sources, and the Road Commission of its own volition resampled the source on the adjoining project which is had previously approved as shown by Exhibit 7, which samples from further sources the Road Commission declared unsuitable, and the resampling from the previously approved source on the adjoining project the Road Commission then also declared unsuitable, as shown by Exhibit 11 attached hereto; that the Road Commission then took no action to accept the adjoining project, that Plaintiff had no approved material which he could immediately place in the special rock fill; that the Road Commission refused any further conferences, ordered Plaintiff from the project, and when he continued to work the items which could still be performed, removed the Project Engineer so he could proceed no further.

XVII

That the Road Commission, after said alleged default, did cause the project to be cross-sectioned by the firm of Michael Baker, Jr., Consulting Engineers; that Plaintiff had a right to, and requested that there be furnished him the complete results of the survey by Michael Baker, Jr., Inc., which results would show all of the work performed by him, but such right and request was refused by the Construction Director; that thereafter the Road Commission did advertise the balance of the work to be performed for a re-letting, and that the low bid received for the completion of the balance of the work was $1,037,855.02; that the Road Commission has informed Plaintiff that under the terms of the contract and bond it will charge back to such sums as may be due him from the Road Commission and to the bond obligation of himself and his Surety, such cost of completion of said project as exceeds the amount that would

have been paid to Plaintiff for completion. That the Road Commission, as an arm of the State, is immune from suit for damages, and remedy therefor would be entirely unavailing for compensation of Plaintiff's loss, and that the Road Commission has publicly declared Plaintiff has defaulted on said contract; and by said declaration has damaged and continues to damage Plaintiff in business and personal standing, and if the Road Commission is permitted to re-let said contract, this Plaintiff will be irreparably injured.

XVIII

Plaintiff claims that the Road Commission, the Road Commissioner and Construction Director were without right or authority in holding Plaintiff to be in an alleged default of said contract and in ordering Plaintiff from the project and subsequently attempting to re-let same, for the following reasons:

1. That by refusing to provide Plaintiff with borrow change orders, and by refusing to pay Plaintiff for the borrow which he had placed in said roadway under the direction and supervision of the Road Commission, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

2. That by compelling Plaintiff, under threat of shutdown for non-compliance, to blend unsuitable material with suitable material in an attempt to upgrade its quality, and without paying him for such operation, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

3. That by compelling Plaintiff, under threat of shutdown for non-compliance, to remove 51,442 cubic yards of special book fill as unsuitable material, which material was in fact suitable and which the Road Commission had previously approved and directed and supervised its place-

ment, without paying him for such removal, and in back-charging him for the amount already paid for its placement, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

4. In compelling Plaintiff, under threat of shut-down for non-compliance, to immediately proceed with replacing the special rock fill, to the exclusion of all other items of work, the performance of which was his right, and after Plaintiff had already once placed such fill with suitable material, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

5. That by delaying Plaintiff in his performance of the work, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

6. In inducing Plaintiff to rely on traversing part of the adjoining project that he might secure special rock fill acceptable to the Commission, and then precluding him from securing it and immediately demanding that he forthwith replace the special rock fill, the Road Commission failed to cooperate and was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

7. That by refusing to pay Plaintiff for all of the unclassified excavation, for all of the special rock fill, and for the miscellaneous items of work performed as set forth in Paragraph V, Subparaph 4, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

And although requested so to do, the Road Commission has refused to rescind its notice of alleged default and denies Plaintiff's claim that Plaintiff is not in default of said contract.

XIX

Plaintiff claims that under the contract the Road Commissioner and Construction Director were without right or authority in failing to certify, and that they each did have a duty to certify, the performance of the items of work and the services and materials supplied, and the amounts due therefor, as referred to in the paragraphs enumerated following:

Paragraph	IX	$ 64,377.00
"	X	37,038.24
"	X	102,884.00
"	X	26,312.40
"	XII	146,411.51
"	XIII	156,300.00
"	XIV	681,881.57
"	XIV	95,000.00
"	XV	28,306.95
TOTAL		$1,338,511.67

And Plaintiff claims under the contract he has a right to be paid the said sum of $1,338,511.67 for the work performed, as hereinabove set forth; that the Road Commission and Commission Members have no right or authority to withhold payment of the above sums, and have a duty to certify and issue requisitions for the payment thereof upon the State Auditor; and that the same has not been done and that the same have not been paid; that same is past due and owing from the Road Commission to Plaintiff, and although payment has been requested, the Road Commission and Road Commissioner have denied Plaintiff's claim and right to payment and have refused certification of the performance and the issuance of requisition for payment thereof upon the State Auditor.

Wherefore, the Plaintiff prays that the Court will:

1. Hear evidence on the disputed questions of fact to be submitted to a jury, trial by jury being herewith demanded.

2. Declare that said contract is not in default by the Plaintiff, and declare the right of the Plaintiff to proceed with the performance of the contract.

3. Declare the right of the Plaintiff to have the Construction Director and Road Commissioner certify the performance of said quantities of work which are completed and unpaid; and the right of the Plaintiff to have the Road Commission and Commission Members issue requisitions for the payment thereof upon the State Auditor.

And for further and coercive relief the Plaintiff asks judgment as follows:

1. That the Commission Members and the Road Commissioner be compelled to cancel and set aside for naught any such part of the records of the Road Commission as may show said contract in default.

2. That the Construction Director and Road Commissioner be compelled to perform their duty and certify to the Road Commission and Commission Members the performance of the work by Plaintiff to date and the amount due therefor, and upon such certification the Road Commission and Commission Members be compelled to perform their duty to issue the requisition of the Road Commission to the State Auditor for payment thereof.

3. That the Road Commission, the Road Commissioner, and Construction Director be compelled to return the necessary Project Engineer to said project to proceed with his customary duties in connection therewith, and be restrained from any interference with the Plaintiff in his return to said work, and restrained from any interference with the Plaintiff in his work except for good cause subsequent arising.

4. That the Road Commission and the Road Commissioner be enjoined from letting any other or further contract to any other person for the balance of the work to be performed on said project, except for good cause subsequently arising.

5. For such other and further relief, both general and special, as to the Court may seem appropriate in the premises.

/s/ Carney M. Layne
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

/s/ Charles W. Yeager
Steptoe & Johnson
Attorneys at Law
Kanawha Valley Building
Charleston, West Virginia

Attorneys for the Plaintiff Howard Price dba Howard Price and Company

APPENDIX J

HOWARD PRICE, d/b/a
HOWARD PRICE & COMPANY,

Plaintiff,

vs. For Declaratory Judgment and Coercive Relief
Civil Action No. 3479

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, *et al,*

Defendants.

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, to-wit:

REPLY AFFIDAVIT IN OPPOSITION TO PAPER WRITINGS FILED HEREIN BY DEFENDANTS AND STYLED MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR WANT OF JURISDICTION, AND THE AFFIDAVITS ATTACHED THERETO

Howard Price, being by me first duly sworn, deposes and says as follows:

1. That he resides at 2829 Roseneath Road, Huntington, Cabell County, West Virginia; that he is the plaintiff in Civil Action No. 3479 now pending in the Circuit Court of Kanawha County, West Virginia, styled "Howard Price dba Howard Price & Company v. State Road Commission, a corporation, et als"; that he makes this affidavit in opposition to the paper writings filed herein by the defendants and styled "Motion for Summary Judgment" and "Motion to Dismiss for Want of Jurisdiction," and that he has personal knowledge of the facts herein set forth.

2. That he is fifty-six years of age; that he has been in the highway construction business all of his adult life; that

moth his father and grandfather were highway contractors before him; that in 1927 he became associated with his father and four brothers in the highway construction business as a principal in the firm known as Price Construction Company, Inc.; that in 1948 he started his own highway construction firm, doing business as Howard Price & Company, and that at that time was prequalified before the State Road Commission of West Virginia to the extent of Fifty Thousand Dollars ($50,000.00); that the amount of a contractor's prequalification is determined by his assets, experience and record of performance, and that in May 1961 his prequalification amount had been increased by the State Road Commission to Two Million, Nine Hundred Thousand Dollars ($2,900,000.00); that his work has been principally grading and draining, as was the work in question in this proceeding; that either as a principal in the corporation aforesaid or through his own firm he has held contracts from the State Road Commission of West Virginia, the Department of Highways for the State of Kentucky, the Department of Highways for the State of Ohio, the United States Engineers, the U. S. Department of the Navy, the C. & O. Railway, and other governmental agencies and companies; that previous to the time the Road Commission declared the supposed default as alleged in the affidavit of R. D. Bryant, he has never defaulted in any contract or had any work taken from him; that the majority of his contracts in the thirty-six years in which he has been a principal in the corporation aforesaid or owned his own contracting firm, have been for the State Road Commission of West Virginia, and to his knowledge said Commission has never expressed any dissatisfaction with the performance of his contracts, previous to the contract involved in the proceeding above mentioned.

2. That until he was removed by the State Road Commission from the project involved in this proceeding, he personally supervised the performance of the work thereon, and the facts alleged in the complaint filed by him are true.

4. That he has read the affidavits made by R. D. Bryant and Wison Ward, each of which is styled "Affidavit in Support of Motion To Dismiss and Motion for Summary Judgment."

5. That he has closely observed the progress of the work of V. N. Green & Co., Inc. on the project involved in this proceeding, and that the final measurement of qualities of work performed thereon could have been made and concluded any time within the past sixty days.

6. That there is no bona fide substantial controversy as to his compliance with the contract, and the items of work and service performed and rendered by him, the quantities thereof or the amounts due therefor.

7. That on further proceedings he will offer in evidence documents, records and competent and qualified testimony which will show that there is no bona fide substantial controversy as to his compliance with the contract, the items of work and service performed and rendered by him, and the quantities thereof and amounts due therefor.

HOWARD PRICE.

Taken, subscribed and sworn to before me by Howard Price in my County and State aforesaid, this the 5th day of December, 1963.

My commission expires March 19, 1969.

L. J. MEISEL,
Notary Public in and for
Cabell County

APPENDIX K

ENTERED
In Circuit Order Book
FEB 23 1965
No. 10
Page 450

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22d day of February, 1965, the following order was made and entered, to-wit:

Howard Price d/b/a Howard Price and Company

vs. Civil Action No. 3479

The State Road Commission of West Virginia, a corporation, et al., etc.

On a former day, to-wit, December 30, 1964, came the petitioner, Howard Price, doing business as Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in this action on the 19th day of May, 1964, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: KENNETH E. HINES,
Clerk Supreme Court of Appeals

APPENDIX B

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY
Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA
Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

ROBERT SARVER
istant Attorney General
te of West Virginia
rleston, West Virginia

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

PHILIP J. GRAZIANI
Assistant Attorney General
State of West Virginia
Charleston, West Virginia
Counsel for Appellees

No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

HOWARD PRICE, d/b/a HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the jurisdictional statement of appellant be dismissed on the ground that the federal question sought to be reviewed was not timely or properly raised in the Circuit Court of Kanawha County, West Virginia, and on the further ground that the state court did not expressly pass on the federal question sought to be reviewed.

STATEMENT OF THE CASE

Appellant entered into a highway construction contract with the Road Commission for the construction of a portion of Interstate Highway 64. The Road Commissioner declared the performance of appellant under his contract to be in default, and caused the appellant to be removed from the project. The appellant alleges that the Road Commissioner acted arbitrarily and without right or authority, and from this basic difference in positions there arises a multitude of substantial controversies of fact.

The appellant instituted a declaratory judgment proceeding in the Circuit Court of Kanawha County, West Virginia, seeking declaratory judgment as to the rights of appellant under the construction contract entered into by him and the State Road Commission of West Virginia, asking: (1) That the rights of the parties be declared; and, sequentially, (2) That, after a declaration of rights, the Commissioner be compelled to perform

his statutory duty to audit appellant's claim for work performed by appellant.

On May 19, 1964, the Court entered its final judgment order sustaining appellees ' motion to dismiss the proceeding as a suit against the State. This is the judgment upon which review is sought.

ARGUMENT

I

Appellant's principal contention is that he has been deprived of his property without due process of law. He complains of the fact that he has not had his day in court, and has had no judicial determination of the merits of his case.

The Supreme Court of the United States lacks jurisdiction of appellant's case because appelant has not exhausted his remedies in the State of West Virginia. The existence of ample and efficient administrative remedies under State laws, and the failure of appellant to resort to them in the state court, prevents him from taking advantage of a federal question involved in the case, and securing a review by the federal Supreme Court. Mellon Co. v. McCafferty, 239 U. S. 134. Certiorari does not lie to determine whether State procedure deprives one of due process if petitioner has not invoked the proper state remedy to have such matter determined. Phyle v. Duffy, 334 U. S. 431.

Article III, Section 9, of the Constitution of West Virginia, states:

> "Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

In effect, appellant is complaining that, in addition to the Fourteenth Amendment to the United States Constitution, the above-cited provision has been violated as well, and that his property, services and livelihood has been "taken" by the actions of the State Road Commissioner. If this be the case, appellant's proper, and still available, course was and is to institute proceedings in mandamus to compel Eminent Domain proceedings. State v. Graney, 143 W. Va. 643, 103 S. E. 2d 888; Riggs v. State Road Commissioner, 120 W. Va. 298, 197 S. E. 813; Hardy v. Simpson, 118 W. Va. 440, 190 S. E. 680; Childers v. State Road Commissioner, 124 W. Va. 233, 19 S. E. 2d 611. These cases uphold the proposition that such mandamus action will lie.

This is not to be confused with the mandamus procedure upheld by the West Virginia Supreme Court of Appeals in Draper v. Anderson, 102 W. Va. 633, 135 S. E. 837. In Draper, there was no great controversy over facts. The labor had been performed under a contract and the Road Commissioner has a "plain legal duty" to issue a warrant to the Auditor. In the present case, there is a controversy as to whether appellant did perform his part of the contract.

The Circuit Court of Kanawha County, in considering this declaratory judgment proceeding, held that the rights of appellant in this proceeding could rise no higher than the rights the appellant would have in an application for a writ of mandamus under the holding in the case of Draper v. Anderson, Supra, because the nature of the relief sought was the payment of money out of the treasury of the State for claims uncontrovertedly shown to involve substantial controversies of fact by the affidavits filed with appellees' motion to dismiss the complaint for lack of jurisdiction.

While the issue of eminent domain proceedings in connection with personal property is not as well established as is that issue as concerns real estate, it is not unknown. A court of claims case has held that a contractual right is within the protection of the Fifth Amendment prohibiting the taking of private property for public use without just compensation. Johnson v. United States, 78 F. Supp. 208. A Texas decision has held that a "going business" is "property" for which recovery can be had in eminent domain

proceedings. Priolo v. City of Dallas, 234 S. W. 2d 1014.

Article III, Section 9, supra, of the West Virginia Constitution, contains no qualification that the "property" can be only real property, nor does the Fourteenth Amendment to the Constitution of the United States, relied upon by appellant. In addition, eminent domain proceedings instituted by the Road Commissioner would ensure a full judicial hearing, with a jury, as desired by appellant. He would have his day in court to air the issues.

II

Appellant has also failed to make use of the procedures for making claims against the State in accordance with Chapter 14, Article 2, of the Code. As stated in Section 1 of the above-cited Chapter and Article:

> "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest."

Prior to 1953, these matters came under the State Court of Claims, but now they are administered by the Attorney General, who, like the

Court of Claims, "* * * is hereby authorized to act as a special instrumentality of the legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, * * * cannot be heard in a court of law * * *." Code 14-2-3. (Section 35, Article VI is the governmental immunity from suit provision.)

Code 14-2-4 confers the Attorney General's jurisdiction:

> "The jurisdiction of the attorney general, under the provisions of this article, except for the claims excluded below, shall extend to the following matters:
>
> "1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.
>
> "2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.
>
> "3. The legal or equitable status, or both, of any claim referred to the attorney general by the head of a state agency for advisory determination."

Code 14-2-5 provides:

"The jurisdiction of the attorney general shall not extend to any claim:

"1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

"2. For injury to or death of an inmate of a state penal institution.

"3. Arising out of the care or treatment of a person in a state institution.

"4. For a disability or death benefit under chapter twenty-three of this Code.

"5. For unemployment compensation under chapter twenty-one-a of this Code.

"6. For relief or public assistance under chapter nine of this Code.

"7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

III

Appellant has been told by the Circuit Court of Kanawha County and by the Supreme Court of Appeals that he cannot maintain his action utilizing the remedy that he has selected, i.e.,

declaratory judgment proceedings, since such proceedings, and the relief sought therein, if fully granted, would result in the controlling of the discretion of an official of the State, in a situation where such official must exercise his discretion in order to carry out the duties of his office. See Douglass v. Koontz, 137 W. Va. 345, 71 S. E. 2d 319.

The declaratory judgment proceeding chosen by appellant is a suit against the State in violation of Article VI, Section 35, of the West Virginia Constitution, and therefore the Circuit Court of Kanawha County properly sustained appellees' motion to dismiss the complaint for lack of jurisdiction.

CONCLUSION

Appellant has the protection of Article III, Section 9, of the Constitution of West Virginia, and has the perfect right to seek a writ of mandamus to require the Road Commissioner to institute eminent domain proceedings to award just compensation for property allegedly taken by the Road Commissioner for public use. In the event that appellant is denied such a writ of mandamus, then appellant has the statutory right to prosecute a claim against the State of West Virginia under the provisions of Chapter 14 of the Code of West Virginia.

For the reasons herein cited and discussed, it is respectfully submitted that appellant has not exhausted his remedies under the Constitu-

tion and the laws of the State of West Virginia, therefor the federal question is not properly before the court and accordingly his application for appeal should be denied.

Respectfully submitted,

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

PHILIP J. GRAZIANI
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

Counsel for Appellees.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

PRICE D/B/A HOWARD PRICE & CO. *v.* STATE ROAD COMM'N OF WEST VIRGINIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA.

No. 144. Decided October 11, 1965.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed in light of the representations of the Attorney General of West Virginia that there is open to the appellant an effective state procedure of which he has not availed himself.

APPENDIX D

State of West Virginia
THIRTEENTH JUDICIAL CIRCUIT
Charleston

Frank L. Taylor
Judge

March 11, 1966

Carney M. Layne, Esq.
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

James W. St. Clair, Esq.
Attorney at Law
523 Seventh Street
Huntington, West Virginia

Charles W. Yeager, Esq.
Attorney at Law
608 Kanawha Valley Building
Charleston, West Virginia

Benjamin A. Ritchie, Esq.
Anthony G. Halkias, Esq.
Legal Division, State Road Commission
1800 Washington Street, East
Charleston, West Virginia

Gentlemen:

Howard Price, dba Howard Price, and Company vs. The State Road Commission of West Virginia and Burl A. Sawyers as State Road Commissioner

In 1963 this plaintiff instituted an action in this Court against the State Road Commission of West Virginia, the Road Commissioner, individual members of the Road Commission, and the Director of the Construction Division of the Road Commission, praying for declaratory relief and

for coercive relief, to compel the then defendants to cause to be paid to him from State funds an amount of money which he claimed to be due under a construction contract entered into between him and the State Road Commission. That case was subsequently heard on a motion to dismiss, which motion was sustained upon the ground that it was an action against the State within the inhibition of Article VI, Section 35 of the West Virginia Constitution. That section is as follows:

> "The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

From the judgment of this Court in dismissing his action the plaintiff appealed to the Supreme Court of Appeals of West Virginia, and that Court declined appellate relief. The plaintiff then appealed to the Supreme Court of the United States for a writ of certiorari to review the findings of this Court and of the Supreme Court of Appeals, whereupon the Attorney General of West Virginia, who is required by statute to represent the State in all matters pending in Federal courts, appeared and made a motion to dismiss upon the ground that the appellant, plaintiff here, failed to make use of remedies available to him under State statutes. These remedies were described by the Attorney General as being (1) a proceeding in mandamus to compel eminent domain proceedings, and (2) the claim procedure against the State as provided for in Chapter 14, Article 2 of the Code of West Virginia. Thereupon, the Supreme Court of the United States, by a *per curiam* opinion, dismissed the appeal upon the representations of the Attorney General.

The plaintiff has now filed his petition in this Court praying for a writ of mandamus to compel the present defend-

ants, that is, The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers as State Road Commissioner, to inrtitute and prosecute an eminent domain proceeding in the proper court to condemn and ascertain the value of the rights of the plaintiff under his construction contract with the State. The rule in mandamus was granted, and the defendants, not now represented by the Attorney General, demurred to the petition upon several grounds. The first of these grounds is that this proceeding contravenes the provisions of Article VI, Section 35 of the Constitution. The petitioner here strongly contends and argues that Article VI, Section 35 of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner.

I have carefully compared the petition herein with the complaint formerly filed, which complaint was exhibited with the petition. The petition here, aside from the demand for mandamus, is in effect and by similarity of language practically the same as the complaint filed in the former action. The contract is described in the same manner, the alleged default is described in the same manner, and the claim asserted by the petitioner is practically for the same amount of money, it having been increased slightly in this petition over the amount demanded in the complaint in the former action.

Many questions have been argued and briefed by counsel dealing with issues which they claim arise in this case. However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding, and the second is whether or not the Attorney General, by his action in appearing before the Supreme Court of the United States and making the

motion to dismiss, has estopped the State from its right to defend upon the ground that this is in effect an action against the State.

As noted, Article VI, Section 35 of the Constitution of West Virginia differs from the Federal Constitution in that it prohibits absolutely any action against the State, except in garnishment proceedings, whereas the Federal Constitution makes provision that the Government of the United States may not be sued without its consent. It is apparently the Federal rule that contract rights between the nation and individuals are only binding upon the conscience of the sovereign, and have no compulsive force and confer no right of action independent of the will of the sovereign. See *Monaco* v. *Mississippi*, 292 U. S. 313, 78 L. ed. 1282, and *Lynch* v. *United States*, 292 U. S. 571, 78 L. ed. 1434. However in *Miller* v. *Board of Agriculture*, 46 W. Va. 192, dealing with the West Virginia Constitution, it was held that "A mere contract will not be enforced by mandamus." In discussion of this point, the following language is used in the opinion written by Judge Brannon:

> "* * * A contract with the State is without legal sanction, as it cannot be enforced by judicial action. The only remedy is appeal to the officers charged with its execution, and, when executed, to the Legislature to pay. * * *"

It is true that in that instance the Court was speaking of an executory contract, but it is my opinion that the principle prevails here. I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here.

This question, however, is not completely controlling. The action of the Attorney General in making his motion in the Supreme Court of the United States may or may not have been ill-advised. It is true that the Attorney General of West Virginia is the chief law officer of the State. See

State v. *Ehrlick*, 65 W. Va. 700. However, the question here is whether, being clothed with this authority, the Attorney General can estop the State and waive its rights. As was said in *State* v. *Chilton*, 49 W. Va. 453, 456:

> "'Grants of power to public officers are usually subjected to strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied. Such an officer can create rights against the State or other public authority represented by him only while he is keeping strictly within the limits of his authority as so construed.' * * * 'This rule is indispensible to guard the public against loss and injury from the fraud, mistake or rashness and indiscretion of their agents.' * * * *"*

I have read much authority upon the question of judicial estoppel arising in instances such as this, some of which has been cited to me by counsel and some of which I have discovered by my own research. It is said in *7 Am. Jur. 2d, Attorney General*, § 15:

> "Although there is some authority to the contrary, it is generally held that unless duly authorized by law, the attorney general may not waive the immunity of the state from suit, and thus cannot bind the state by appearing in an action so as to give the court jurisdiction. Nor can the attorney general give up rights of the state by an admission in court as to the legal effect of a statute."

In *19 Am. Jur., Estoppel*, § 77, the rule is laid down that a court cannot acquire jurisdiction of the subject matter of litigation by estoppel.

And in *49 Am. Jur., States, Territories and Dependencies*, § 96, it is stated in a footnote that where the state merely makes a special appearance for the purpose of protesting against the court's jurisdiction, there is no waiver of immunity.

In *Cunningham* v. *County Court of Wood County* (W. Va. 1964), 134 S.E. 2d 725, it is said at page 729:

> "The general rule is that estoppel may not be invoked against a governmental unit when functioning in its governmental capacity. 31 C.J.S. Estoppel §§ 138-142, pages 675-719; Anno., 1 A.L.R. 2d 338."

In the annotation just referred to in the quotation, the subject is discussed and many cases are cited with the statement made that claims cannot be created against the State by estoppel.

In the recent case of *Main* v. *Department of Highways* (Va. 1965), 142 S.E.2d 524, the statement is made that the doctrine of estoppel cannot apply to the rights of a state when acting in its sovereign or governmental capacity. See also *Ford Motor Company* v. *Treasury Department*, 323 U.S. 459, 89 L. ed. 389.

While the foregoing discussion, in my opinion, necessitates action on my part in sustaining point one of the demurrer, and while I believe that to be decisive of the controversy presented on this record, yet, being in this instance a court of original jurisdiction, it is probably incumbent upon me to rule upon the other questions raised on the record. While I personally entertain considerable compassion for the petitioner here, he being left, in the words of Judge Brannon, *supra*, as having a contract without legal sanction which cannot be enforced by judicial action, yet I must take further note of the position taken by the Supreme Court of Appeals in *Cunningham* v. *County Court of Wood County*, *supra*, in which it is said that:

> "* * * This Court * * * is sternly and unmistakably enjoined to leave drastic changes in the common law to the legislative branch of the state government. Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

If that be true, how much more incumbent it is upon me as a judge of a *nisi prius* court to observe the Constitution and the common law of the state, and to declare as constitutional that part of the common law which has so long been pronounced in this State. I personally am of opinion that the doctrine of immunity of the sovereign as stated in our Constitution, is archaic and completely out of step with the times, when we observe the government, state and federal, engaging in big business. However, this is the rule, and I do not believe that I have the authority, or the right, or the duty to declare that section VI, Article 35 of the Constitution of West Virginia contravenes any other section or part of either the Federal or State Constitution.

The second ground of the demurrer, to the effect that this properly involves the exercise of discretion on the part of the respondents, has already been decided by me in the former opinion written in the other proceeding on April 13, 1964, and is, in my opinion, now *res judicata*.

Grounds 3, 4, 5 and 6 of the demurrer relate to the type of property which is sought to be compelled to be condemned by this proceeding, and in my opinion the discussion had heretofore in this memorandum is decisive of those questions.

Ground 7 of the demurrer raises the question of whether or not the petitioner should have pursued and exercised his remedies of prosecuting a claim against the State through the office of the Attorney General. While this may be a proper answer in this kind of case (*Miller v. Board of Agriculture, supra*), yet I am not prepared to say that the prosecution of such a claim constitutes a legal remedy and gives the petitioner a day in court. However, I do not believe that it is necessary to rule upon that ground of the demurrer since here the petitioner is seeking to have his rights determined by a court and not by the executive and legislative branch of the government.

Grounds 8 and 9 raise the question of *res judicata*, and as heretofore indicated, I believe that the questions to which those grounds of the demurrer relate were decided by me in the former proceeding.

The tenth ground of the demurrer asserts that the petition fails to show a clear legal right in the petition. Even assuming that the petitioner has, by virtue of his contract with the Road Commission, acquired a vested property right subject to condemnation, and recognizing that our State Supreme Court of Appeals has construed Article III, Section 9 of the West Virginia Constitution as authority for instituting a suit to compel the State Road Commissioner, by mandamus, to compensate owners of property taken for road purposes, it is an established requirement in this State that such a suit must be predicated upon a showing of a clear legal right to the relief sought. As heretofore indicated, I have carefully compared the petition herein with the petition in the former proceeding and find that they are substantially identical, and that the present petition fails to show a clear legal right in the petitioner.

The eleventh ground of the demurrer, in my opinion, goes outside the record, and should be overruled, but I believe this ground bears no relation to the case at hand.

For the foregoing reasons, based upon the authorities cited herein and in the former opinion, which is exhibited with the record, and based upon the conclusions which I have reached, it is my judgment that the petition here in mandamus is merely a further effort on the part of the petitioner to enforce a right which, under the West Virginia Constitution, he cannot enforce in this proceeding, and I am, therefore, of opinion to sustain points 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the demurrer, deny the writ of mandamus, and dismiss the petition.

A proper order in conformity herewith, and making this letter memorandum of opinion a part of the record, should

be tendered promptly for entry. A copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX E

HOWARD PRICE, d/b/a
HOWARD PRICE AND COMPANY

v. Upon Mandamus—Civil Action No. 6098

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS AS STATE ROAD COMMISSIONER

On the 29th day of January, 1966 came the Petitioner Howard Price dba Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his counsel, and came the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, by Benjamin A. Ritchie, their counsel; and this matter having been regularly docketed for further proceeding this date, came on to be heard upon the mandamus petition, the order entered January 5, 1966 filing said petition; upon the rule directed to the Respondents to show cause why a writ of mandamus should not be awarded against them as prayed for in said petition, issued on January 5, 1966, returnable to January 15, 1966, allowing Petitioner to January 22, 1966 to demur or reply to Respondents' answer, if any, and setting the matter down for hearing on January 29, 1966; upon Respondents' demurrer to said petition and Respondents' answer to said petition filed January 21, 1966; upon Petitioner's demurrer to Respondents' answer and Petitioner's reply to Respondents' answer filed January 29, 1966; and the same was argued by counsel, both orally and by brief.

Whereupon the Court took time to consider its decision and after mature deliberation of Respondents' demurrer to

the petition, is of the opinion to and doth hereby SUSTAIN Points 1, 2, 3, 4, 5, 6, 8, 9 and 10 of Respondents' demurrer to said Petition, does OVERRULE Point 11 thereof, and makes no ruling on Point 7 thereof; all for the reasons expressed in a letter memorandum of opinion of the Court dated March 11, 1966, which letter memorandum of opinion is ordered to be, and is hereby filed herein as a part of this order and made a part of the record in this cause. And having so ruled it became unnecessary to rule upon Respondents' answer or Petitioner's demurrer and reply thereto.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. The writ on mandamus prayed for in the aforesaid petition, be, and the same is hereby, denied;

2. Petitioner's prayer in the alternative as in the petition contained for other and further relief by way of declaratory judgment, be, and the same is hereby, denied;

3. The petition herein be, and it is hereby, dismissed without prejudice, and;

4. Respondents be, and they are hereby, awarded judgment against the Petitioner for their costs in their own behalf expended and a statutory fee of Ten ($10.00) Dollars.

To which action of the Court in not sustaining Points 7 and 11 of their demurrer, the Respondents, by counsel, did object and except.

And to which action of the Court in sustaining the aforesaid points of Respondents' demurrer, in denying the writ as prayed for, in denying other and further relief in the alternative by way of declaratory judgment, and in dismissing his petition, Petitioner, by counsel, did object and except for the following reasons:

1. The application by the Court to this case of Section 39, Article VI of the Constitution of West Vir-

ginia is repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable to the State by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives Petitioner of his property without due process of law, and constitutes the taking of private property for public use without compensation.

2. The State has consented to suit against Respondents by its participation of the subject highway project in the Federal Interstate Highway Program, and the application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce.

3. The inapplicability to this proceeding of Section 35, Article VI of the Constitution of West Virginia became the law of this case by virtue of the per curiam opinion of the Supreme Court of the United States rendered on Respondent's motion in appeal of Civil Action 3479 from this Court, and Respondents are judicially estopped from asserting such constitutional provision in this mandamus proceeding.

4. Petitioner's work, services, labor and material performed pursuant to the contract incorporated in the highway for public use and appropriated by Respondents, is property within the protection of the due process clause of Section 1 of the Fourteenth Amendment to the Federal Constitution and within the protection of the Fifth Amendment to the Federal Constitution as made applicable to the State by the Fourteenth Amendment, and it is a proper subject for eminent domain proceedings.

5. Petitioner has in good faith shown a reasonable cause to believe the question of his property rights, and the taking thereof, should be judicially resolved and such constitutes a clear legal right in a man-

damus proceeding to compel eminent domain proceeding.

6. The application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to and denies Petitioner the rights guaranteed to him under Sections 9, 10, and 17, Article III of the Constitution of West Virginia.

7. The proceeding is not a suit against the State within the prohibition of Section 35, Article VI of the Constitution of West Virginia for the reasons (1) it involves the construction of a public road under contract to a private party, (2) is a proceeding to compel the performance of constitutional and statutory duties by Respondents, and (3) any expenditure that might ultimately be made on eminent domain proceeding would not come from the general revenue of the State but would come from the State Road Fund as segregated by Section 52, Article VI of the State Constitution for the express purpose of paying obligations incurred in the construction of public highways.

8. The Court's ruling is contrary to the law and the pleadings.

9. The decision of the Court in Civil Action 3479 is not res judicata as to this mandamus proceeding since the object of this proceeding and relief sought herein is not responsive to the pleading in declaratory judgment.

10. Such other reasons as Petitioner may assign on appeal.

Dated this 25th day of June, 1966.

ENTER:

FRANK L. TAYLOR, *Judge*

INSPECTED BY:

BENJAMIN A. RITCHIE
Counsel for Respondents

CARNEY M. LAYNE
CHARLES W. YEAGER
Counsel for Petitioner

APPENDIX F

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of December, 1966, the following order was made and entered, to-wit:

HOWARD PRICE d/b/a HOWARD PRICE AND COMPANY

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, August 24, 1966, came the petitioner, Howard Price d/b/a Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his attorneys, and presented to the Court his petition praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX G

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of February, 1967, the following order was made and entered, to-wit:

HOWARD PRICE d/b/a HOWARD PRICE AND COMPANY

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, January 4, 1967, came again the petitioner, Howard Price d/b/a Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his attorneys, and presented to the Court his first and second petitions praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petitions, and notes of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused on this second application.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX H

Pertinent State Constitutional Provision

Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding the following new section:

ARTICLE VI

* * *

REVENUES APPLICABLE TO ROADS

§52. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deductions of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and *used solely for construction*, reconstruction, repair and maintenance of *public highways*, and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, *and the payment of obligations incurred in the construction*, reconstruction, repair and maintenance *of public highways*. (Italics supplied)

APPENDIX I

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

Section 1. *There shall be a state road fund, which shall* consist of the proceeds of . . . When any money is collected from any of the sources aforesaid, it shall be paid into the state treasurer by the officer whose duty it is to collect and account for the same, and *credited to the state road fund, and shall be used only for the purposes named in this chapter, that is to say;* (a) To pay the principal and interest due on all state bonds issued for the benefit of said fund, and set aside and appropriated for that purpose; (b) to pay the expenses of the administration of the road department; (c) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all primary roads;* (d) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all secondary roads.* * * * (Chapter 3, Acts of the Legislature of West Virginia, 2d Extraordinary Session, 1933, p. 7; Chap. 17, Art. 3, Sec. 1 of Michie's West Virginia Code. (Italics supplied)

§2. COST OF CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT AND MAINTENANCE OF STATE ROADS.—*The cost* and expense *of the construction,* reconstruction, improvement or maintenance *of all state roads shall be paid out of any moneys received by* or appropriated to *the state road commission for that purpose* (Chapter 17, Article 3, Section 2, Official Code of West Virginia, 1931, p. 390; Same, Michie's Code of West Virginia. (Italics supplied).

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor* or others, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission,* pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the*

commission's requisition upon the auditor of the State therefor, showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the Treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; Chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia. (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR.

—*All work of construction* • • • *of state roads* • • •, *and the furnishing of all materials and supplies therefor* • • • *shall be done and furnished pursuant to contract* • • • (Chapter 143, Acts of the Legislature, Regular session, 1957, p. 687, Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code. (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.—

• • • (Chapter 3, Acts of the West Virginia Legislature, Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code.

Section 21. FORM OF CONTRACT; SIGNING.—

• • • (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia.

APPENDIX J

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HOWARD PRICE dba
HOWARD PRICE and COMPANY,

Petitioner,

v.

Upon Mandamus

With Other Appropriate Relief Thereunder, Including Alternatively, for Declaratory Judgment With Coercive Relief

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation, and BURL A. SAWYERS as State Road Commissioner,

Respondents.

PETITION

To the Hon. Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia:

The Petitioner, Howard Price, dba Howard Price and Company says as follows:

This is a proceeding in mandamus brought to compel the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, to institute proceedings under eminent domain to legally acquire from the Petitioner, and to pay him just compensation for, certain property belonging to Petitioner and wrongfully taken and appropriated by the Respondents by virtue of (1) Respondents' wrongful abrogation of a certain highway construction contract between Petitioner and Respondents, and (2) Respondents' wrongful taking and appropriation for public use of work, services, labor and material performed and supplied by Petitioner and

incorporated in a highway construction project, and for which Petitioner has not been paid.

The subject matter of this proceeding is the same as in Civil Action No. 3479, styled "Howard Price dba Howard Price and Company vs. the State Road Commission of West Virginia, a corporation, and others," instituted in the Circuit Court of Kanawha County, West Virginia. In that proceeding the Petitioner sought a declaration of his rights under the highway construction contract here involved. Particularly he sought a declaration that he was not in default under the terms of said contract, and a declaration of his right to have certified by Respondents his performance of various items of work, services, labor and material as hereafter set forth. In addition, Petitioner sought coercive relief compelling the Road Commissioner to certify the performance of such work and to issue his requisition to the State Auditor for the payment thereof. In such proceeding the Respondents filed two successive motions to dismiss said declaratory judgment proceeding on the grounds the same constituted an action against the State of West Virginia within the prohibition of Section 35, Article VI of the State Constitution. The latter of said motions was sustained in whole, and the proceeding dismissed.

On appeal to the Supreme Court of Appeals of West Virginia the petition for review was denied. Petitioner then appealed to the Supreme Court of the United States. The ground for such appeal was that the application of said State constitutional provision to the facts of this case deprived Petitioner of his property for public use without due process of law, and denied him a day in Court, in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution and in violation of the Fifth Amendment to the Federal Constitution as made applicable to the States by said Fourteenth Amendment. The respondents, appearing by the Attorney General of this State, filed a motion to dismiss and represented to said Court that the

Petitioner had an adequate remedy through the institution of proceedings in mandamus to compel the Respondents to institute proceedings under eminent domain to ascertain just compensation for the property taken from Petitioner. The Supreme Court of the United States by per curium opinion at the October Term, 1965, dismissed the appeal in "light of the representations of the Attorney General of West Virginia that there is open to appellant an effective state procedure of which he has not availed himself," — U.S. —, 15 L Ed. 2d 8, 86 S Ct —. Such prior proceeding is here pleaded so that the Court may take judicial notice thereof, and there is attached hereto marked Exhibit A, and made a part hereof, the same as if verbatim copied herein, pertinent portions of the record of such prior proceeding.

Petitioner now avails himself of such procedure as represented by the Attorney General, and the subdividing titles being placed for convenience of reference only, further says as follows:

I

THE DEFENDANTS

A.

1. That the Respondents, the State Road Commission of West Virginia, sometimes hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2 of the Code of West Virginia, 1931, as amended; that the office of State Road Commissioner was created and exists under and by virtue of Chapter 17, Article 2A of the Code aforesaid; that the Respondent Burl A. Sawyers as State Road Commissioner of West Virginia, sometimes hereafter referred to as "Road Commissioner", has been duly appointed and is presently acting as such; that by virtue of Chapter 17 of the Code aforesaid, the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor and to institute,

prosecute, defend, suits, actions and proceedings and to otherwise exercise all powers, and functions necessary and germane to its public corporate existence and purposes; and by virtue of Chapter 17, Article 3, Section 4 of said Code, it is the duty of the Road Commissioner to audit the claims of contractors and for those found correct to issue requisitions upon the State Auditor for payment thereof from the constitutionally established State Road Fund.

2. That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn duty to abide by and uphold the Constitution of this State and of the United States, and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty or property without due process of law as required by Section 1 of the Fourteenth Amendment to the Federal Constitution, and Section 10, Article III of the State Constitution, nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid), and Section 9, Article III of the State Constitution; and all references hereafter to said Federal Constitutional provisions shall be taken to include reference to the aforesaid similar State Constitutional provisions. In pursuance of the duties aforesaid, it is the further duty of said Road Commission and Road Commissioner, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property taken and appropriated by them for public use."

II

THE CONTRACT

A.

1. That the Road Commission, acting through Patrick C. Graney, the then Road Commissioner for the State of West Virginia, did after bid award, enter into a contract, here-

after referred to as "contract", with the Petitioner, Howard Price dba Howard Price and Company, for the grading and draining of a certain portion of the roadway known as Interstate Highway 64, located in Cabell County, West Virginia, and more particularly designated as Project Number 1-64-1 (37) 22, Cabell County, hereafter referred to as "project", and which said contract is dated August 12, 1960; that the contract documents consists of (1) the contract instrument, (2) the contractor's proposal, (3) the Standard Specifications, Roads and Bridges, of the State Road Commission of West Virginia, Adopted 1952, (4) the Special Provisions to said contract and amendments and revisions to said Standard Specifications, (5) the contract bond, and (6) the drawings and plans for said project, a copy of each of which, except the drawings and plans, was attached to the Complaint in the previous proceedings and is included herewith as part of Exhibit A.

2. The aforesaid Interstate Highway 64 is a part of the national highway system promoted by the Federal Government. On the construction thereof the Federal Government furnishes participating funds to the Road Commission to the extent of 90% of the cost thereof, including that of the project here involved.

3. Upon the signing of said contract by the parties the Petitioner did acquire a right of property therein within the meaning of the protection of Section 1 of the Fourteenth Amendment and the Fifth Amendment to the Federal Constitution, and it became and then and thereafter was the duty of the Road Commission and Road Commissioner to accord to Petitioner the protection of said contract guaranteed by the Federal constitutional provisions aforesaid, and not to deprive Petitioner of his right of property therein without due process of law nor take and appropriate such right of property for public use without just compensation.

B.

1. Said Contract was by bid, and was entered into upon the basis of unit prices for estimated quantities, hereafter referred to as "estimated quantities", of items of work, services, labor and material, as estimated by the Road Commission, and the total estimated contract price, based on estimated quantities was $1,352,235.48; that said estimated quantities were subject to the requirements of the project, being either more or less than estimated, and the total estimated contract subject to being adjusted on the basis of the agreed unit prices for its quantities actually required.

C.

1. Said contract provided, among other things, as follows;

(1) That the performance of all items of work would be under the supervision and control of the Road Commission through its Engineer, and that the Road Commission would have the right to suspend work for various reasons, including failure of Petitioner to obey and carry out orders of the Road Commission personnel (Standard Specifications, Sec. 1.5.1, p. 16; Sec. 1.8.4., p. 31).

(2) That the Road Commission would each month estimate the amount of work performed by Petitioner and compute the value thereof from the unit prices, and after deducting 5% retainage, pay Petitioner therefor once a month for the work performed in the preceding month (Contract, Paragraph 10).

(3) That the Road Commission, subject to certain qualifications, would have the right to increase the quantities of work as may be necessary to complete the project, and that Petitioner would perform any such item at the same price as that bid upon the original quantity (Standard Specifications, Sec. 1.4.2, p. 12).

(4) That for any item not included in the original contract there might be executed a supplemental agreement at a price thereof agreed by the parties as a fair and reasonable price (Standard Specifications, Sec. 1.4.2, p. 12).

2. Inherent in such contract was the duty of Respondents to cooperate with Petitioner in its execution, and to act in good faith, and not to obstruct, hinder or render impossible the performance by Petitioner.

3. Each of the items of work covered by said contract included both the material concerned in said item and the work, services and labor required to put said item in place, or as the case may be, to remove it, and that among, but not all, said items are the following:

(1) Item 3-A, Borrow Excavation, the estimated quantity of which, as determined by the Road Commission as necessary for said project, was 22,950 cubic yards, for which Petitioner bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which borrow is earth material secured by the contractor from off the right-of-way, measured in the "cut" of its removal, and used on the right-of-way as fill material.

(2) Item 125, Special Rock Fill, the estimated quantity of which, as determined by the Road Commission as necessary for the project, was 278,111 cubic yards, for which Petitioner's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which Special Rock Fill is rock secured by the contractor either on or off the right-of-way, and which is measured in the "fill" (which is in place on the roadway) and used on the right-of-way as fill material of special quality.

(3) Item 2, Unclassified Excavation, the estimated quantity of which, as determined by the Road Commission as necessary for the project, was 1,525,000 cubic yards; for which Petitioner's bid and contract price was Forty-Nine Cents (49¢) per cubic yard; and which unclassified excavation is material cut from the roadway area and measured in the "cut" of its removal, and when suitable, is used in the fills, and if unsuitable, is "wasted", that is, disposed of off of the project.

(4) The following miscellaneous items of the following estimated quantities and bid prices:

ITEM NO.	DESCRIPTION	ESTIMATED QUANTITY	UNIT BID PRICE
6 A	Structure Excavation	19,263 CY	$ 2.25
71	Class A Concrete	891 CY	55.00
107	Cr. Stone, Sand or Gravel for Underdrain	2,322 CY	7.50
107 A	Cr. Stone, Sand or Gravel for Culvert Foundation	8,509 Tons	4.50
127 A	Maintaining Traffic	Lump Sum	5,000.00
131 C	Temporary Fence	8,500 LF	.15
136	Engineer Field Office	Lump Sum	3,000.00
138	Construction Layout Stakes	Lump Sum	10,000.00
42-C	24" Paved Invert CMP 14-GA	4,946 LF	6.75

4. The contract provides for the performance of extra work as directed by the Road Commission and the payment thereof at a fair and reasonable price. That work, services and labor involved in blending certain materials with other materials to reach a degree of suitability for the purpose of fills, is not included under the item of Unclassified Excavation, and if not separately itemized in the contract, and later required, is a special item and proper subject for change order and payment under a supplemental agreement. That similarly under said contract, work services and labor involved in standing-by and holding equipment subject to the order of the Road Commission, is a special item and proper subject for payment of equipment rental and stand-by expense under a supplemental agreement.

III

CONDITIONS UNDER WHICH PERFORMANCE OF CONTRACT WAS HAD

A.

1. Petitioner says that on or about September 6, 1960 he commenced the performance of said contract and on September 11, 1962 his work was arbitrarily and wrongfully terminated by the Road Commission; and that at that time he had performed approximately 80% of the original contract plus overruns and his working time was unexpired.

2. That the supervision and control of Petitioner's work was under the Project Engineer (who reported to the Area Engineer), the Area Engineer (who reported to the Assistant District Engineer), the Assistant District Engineer (who reported to the District Engineer), the District Engineer (who reported to the Construction Director), the Regional Engineer (who also reported to the Construction Director), and the Construction Director of the Road Commission itself. That for some time prior to November, 1961, Petitioner was receiving direct from the various echelons of the Road Commission engineering personnel, contradictory and confused directions and orders, which directions and orders were arbitrarily and capriciously issued, allegedly under Respondents' right of supervision and direction as provided in the contract, and were under threats, express and implied, of work suspension for non-compliance, until matters reached such stage that Petitioner did not know whose directions to follow.

3. Through said period and because of the delays of the Road Commission personnel, it was impossible to satisfactorily proceed, and Petitioner's equipment and work force were unable to work effectively on the project. At the direction of the Construction Director, the project was closed down on or about November, 1961, until proper direction might be supplied. The project remained closed down until the latter part of April, 1962.

4. Shortly before the work resumption in the latter part of April, 1962, at a conference held on April 4, 1962, it was agreed that Petitioner would blend with Borrow the silty material hereafter referred to in Paragraph VI B., remove certain portions of the special Rock Fill, with reservation of his rights thereunder, as referred to in Paragraph V A., and proceed with several minor items, and the Road Commission agreed that it would take the necessary steps to immediately pay Petitioner for the Borrow, referred to in Paragraph IV B. and C.; that Petitioner proceeded according to each particular of his agreement under the direction and supervision of Road Commission personnel, and to their complete satisfaction, until he had reached the point at which in the orderly progress of work and proper sequence of performance, he had to obtain more Borrow material to place in the fill and to be allowed by the Road Commission to travel onto the adjoining project to obtain more Special Rock Fill. Petitioner was again delayed by the arbitrary inaction of the Road Commission and its personnel, and his equipment and work force were unable to work effectively while awaiting Respondents' decisions, and such continued until the Respondents wrongfully and arbitrarily terminated Petitioner's contract.

IV

BORROW EXCAVATION

A.

1. The 22,950 yards of Borrow as originally estimated by the Road Commission was insufficient for the completion of the project, and Petitioner says that the project required approximately 190,835 cubic yards; that the Road Commission further determined that additional material of a Borrow nature was required, which it classified as Random Borrow, an item of material not listed in the contract, and the Road Commission estimated the amount of Random Borrow required as being approximately 35,000 cubic yards,

and that the Road Commission and Petitioner agreed that a fair and reasonable price therefor was the sum of $1.50 cubic yard.

B.

1. In the spring of 1961, Petitioner advised the Road Commission that the Borrow required would exceed the estimated quantity and the Road Commission through the Construction Director, on October 6, 1961 prepared a change order increasing the estimated quantity of Borrow, and forwarded it to the Petitioner. The change order was signed by Petitioner and his Surety and returned to the District Engineer, and thereafter forwarded to the Construction Director. That after said order was received by the Construction Director, he prepared another in its place for the stated reason some change was required in the contents and such new change order was passed through channels, signed by Petitioner, his Surety, and the District Engineer and returned to the Construction Director, where again the same action was arbitrarily repeated and the same sequence of events followed. Petitioner signed approximately five such change orders, all covering the same matter of quantity of Borrow, the last of which change orders was dated July 6, 1962.

2. A short time previous to the time of the last change order on Borrow, the Construction Director also prepared and sent to Petitioner a supplement agreement on Random Borrow. This agreement provided for a price of $1.50 per cubic yard as agreed upon between the Road Commission and Petitioner. The supplemental agreement was on June 15, 1962, likewise signed by Petitioner, his Surety and the District Engineer, and returned to the Construction Director.

3. The Construction Director, during the period covered by the execution of the change orders, did not furnish Petitioner a signed copy of any of the change orders for the

stated reason that a new and superseding one was to be issued, and in the summer of 1962 shortly before and at the time of the alleged default, arbitrarily refused to furnish Petitioner any signed copy of a change order on Borrow or a signed copy of the supplemental agreement on Random Borrow.

C.

1. After the execution of the first change order by Petitioner, his surety, and the District Engineer, and pursuant to the right of supervision and control by Respondents as provided in the contract, Petitioner was directed by Respondents, to borrow in excess of the originally estimated quantity and to place the additional amounts in the roadway, which Petitioner did and continued to do, according to the specifications, as necessary for the roadway construction, and under the inspection and at the insistence of the Road Commission. Petitioner placed therein approximately 69,975 cubic yards of Borrow in addition to the estimated quantity of 22,950 cubic yards, of value at bid price in the amount of $64,377.

2. That Petitioner's work, services, labor and materials comprehended under the item of "Borrow" were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and was thereafter the duty of Respondents not to deprive Petitioner of his rights of property therein without due process of law, nor take and appropriate such for public use without just compensation.

V

SPECIAL ROCK FILL

A.

1. Petitioner secured sources of material suitable for Special Rock Fill, and while under the contract no test of suitability of Special Rock Fill was required other than visual

inspection, nevertheless Respondents had said material examined by laboratory analysis, found it suitable, and approved it for use as Special Rock Fill. On November 4, 1960, Petitioner commenced the performance of this item and placed said Special Rock Fill at the locations called for, with the approval and under the direction and supervision of Respondents acting through their duly authorized personnel. The performance of said work was included in the monthly estimates, certified by the Respondents, approved for payment, and paid for (less retainage) by the Respondents. After approximately 100,000 cubic yards of this item had been so placed by Petitioner, the Respondents arbitrarily claimed a part thereof was not suitable for Special Rock Fill, when in fact it was suitable, and arbitrarily directed Petitioner to remove 51,442 cubic yards thereof, under threat of suspending work on the project if not complied with. After objecting and reserving his rights, Petitioner removed said 51,442 cubic yards. After the removal of said rock, the Respondents, on the payment of the next monthly estimate arbitrarily and wrongfully deducted from the amount due Petitioner for other items of work performed by him, the sum of $37,038.24, representing the 51,442 cubic yards of Special Rock Fill for which the Respondents had previously paid and then required Petitioner to remove.

2. The removal of said rock was a special item and the proper subject for supplemental agreement which Respondents refused to furnish. The cost or removing said rock was in excess of the cost of its placement, and a reasonable and fair price and value for such removal is $2.00 per cubic yard, for a total sum of $102,884. Petitioner says that under the contract he has a right to be paid the said sums of $37,038.24 and $102,884.00.

3. Petitioner placed a total of 160,103 cubic yards of Special Rock Fill, not including the 51,442 cubic yards placed and removed as aforesaid. Of such 160,103 cubic yards, Pe-

titioner has been paid (less retainage) for 123,558 cubic yards only; that Petitioner has not been paid for the balance of 36,545 cubic yards, which at bid price is of the value of $26,312.40, and that under the contract he has a right to be paid said sum of $26,312.40.

4. That Petitioner's work, services, labor and material comprehend under the item of "Special Rock Fill", including both the fill and extra work in removing part thereof, were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and was thereafter the duty of Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

B.

1. To replace the said 51,442 cubic yards removed from the Special Rock Fill, and to complete the performance of the item of Special Rock Fill, the Road Commission by laboratory analysis approved certain material located partly on and partly off the adjoining highway project, hereafter referred to as "Robertson-Fowler project". The quantity which was partly off said adjoining Robertson-Fowler project was accessible only from said adjoining project. Respondents agreed to make a partial acceptance of the roadway area, and agreed that Petitioner could traverse part of such roadway area to secure the material. Notwithstanding said agreement, in the summer of 1962, when the contractor on the Robertson-Fowler project had completed the phases of work necessary to allow Petitioner to traverse part of the roadway to the material source, Respondents arbitrarily and wrongfully refused to allow Petitioner access to the material.

VI

UNCLASSIFIED EXCAVATION AND BLENDING

A.

1. Under the direction and order of the Respondents, issued pursuant to their right of supervision and control as provided in the contract, Petitioner excavated a total of 1,676,369 cubic yards of unclassified excavation and has been paid (less retainage) for 1,377,570 cubic yards thereof. Petitioner has not been paid for the balance of 298,799 cubic yards, which at bid price is of the value of $146,411.51, and Petitioner says that under said contract he had a right to be paid $146,411.51 therefor.

2. That Petitioner's work, services, labor and materials comprehended under the item "Unclassified Excavation", were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and was thereafter the duty of Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

B.

1. That under the arbitrary and capricious direction and order of Respondents, under threat of shut-down for non-compliance, Petitioner was required to place in the fill, material from unclassified excavation which was silty, of high water absorption and without compaction. Respondents, perceiving the fill material was unsuitable, then required Petitioner to place suitable material in the fill, and in attempting to up-grade such material and give it some binding and compacting quality, arbitrarily directed and ordered Petitioner, under threat of shut-down for non-compliance, to mix and blend the silty unsuitable material with suitable Unclassified Excavation or with Borrow secured

from off the project. Such blending was a special item of extra work for which Respondents instituted but refused to finalize a proper change order and supplemental agreement. The reasonable and fair price and value of such blending is Fifty Cents (50¢) per cubic yard; and Petitioner was compelled to blend approximately 312,600 cubic yards of a total value of $156,300, and Petitioner says that under the contract he has a right to be paid the sum of $156,300 therefor.

2. That Petitioner's work, services, labor and material comprehended in the performance of Blending, were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and thereafter was the duty of the Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

VII

EQUIPMENT RENTAL AND OTHER EXPENSE

A.

1. During the numerous delays and after the project was closed down in November, 1961, and after resumption of work in April, 1962, and during the further delays occasioned by Respondents arbitrary refusal to provide a Borrow change order as alleged in Paragraph IV B., and their arbitrary refusal to allow Petitioner to traverse a portion of the Robertson-Fowler project so as to secure Special Rock Fill, as alleged in Paragraph V B., much of Petitioner's equipment and work force were unable to work effectively as a direct and proximate result of Respondents' aforesaid arbitrary and capricious acts. The Respondents were notified of Petitioner's charge for equipment rental and other expenses and that he did not expect to be charged with working time for the periods in which he had been

delayed by Respondents. The Equipment rental and stand-by expense were part of the cost of said project and were special items and proper subject for payment under a supplemental agreement, and which Respondents refused to furnish. The reasonable and fair price and value of the use of Petitioner's equipment properly chargeable to Respondents is $681,881.57, and the reasonable and fair price of other stand-by services rendered by Petitioner and properly charged to Respondents, is $95,000; and Petitioner says that under the contract he has a right to be paid said sums of $681,881.57 and $95,000.

2. That Petitioner's services in holding said equipment subject to the order of Respondents and standing-by, were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and thereafter was the duty of Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

VIII

MISCELLANEOUS ITEMS PERFORMED AND UNPAID

A.

1. The following miscellaneous items, as referred to in Paragraph II C 3(4), have been performed by Petitioner in the quantities indicated. All of the quantities are within the estimated quantities, and at bid price are of the value indicated, and Petitioner has not been paid the sums due for the quantities indicated:

Item No.	Description	Unit Bid Price	Total Quantity Performed	Quantity Unpaid	Amount
6A	Structure Excavation	$ 2.25CY	13,169CY	3,216	$7,236.00
71	Class A Concrete	55.00CY	231CY	16	880.00
107	Cr. Stone, Sand or Gravel for Underdrain	7.50CY	1,045CY	486	3,645.00

Item No.	Description	Unit Bid Price	Total Quantity Performed	Quantity Unpaid	Amount
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	Tons 4.50	Tons 8,509	459	2,065.50
127A	Maintaining Traffic	Lump Sum $ 5,000.00	100%	100%	5,000.00
131C	Temporary Fence	.15CF	8,500LF	2,433	364.95
136	Engineer Field Office	Lump Sum 3,000.00	100%	33⅓%	999.00
138	Construction Layout Stakes	Lump Sum 10,000.00	100%	30%	3,000.00
42-C	24" Paved Insert CMP 14 GA	6.75LF	2,031LF	1,064	7,182.00

Petitioner says that under the contract he had a right to be paid the sums so indicated totaling $28,306.95.

2. That Petitioner's work, labor, services and material comprehended in each of the above items were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and thereafter was the duty of the Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

IX

RETAINAGE HELD

A.

1. During the progress of the work the Road Commissioner certified the performance of part thereof, including some of the items heretofore mentioned, but for convenience herein set apart separately, upon which certification was issued on monthly estimates less five (5%) per cent retainage, and for which the Road Commissioner issued requisitions upon the State Auditor for the payment therefore less said retainage. That said items, the quantity thereof so certified for payment, the unit prices, and totals paid (less retainage), are as follows:

Items	Unit Price	Quantity Certified	Total Price
Clearing and Grubbing	$ 100.00	98 AC	$ 9,800.00
Unclassified Excavation	.49	1,377,570 CY	675,009.30
Borrow Excavation	.72	22,950 CY	16,524.00
Structure Excavation	2.25	9,950 CY	22,387.50
Crusher Run Stone Base	4.50	1,462 Tons	6,579.00
24" Paved Inv. C.M.P. (Fully Coated) 14 Gage	6.75	1,103 LF	7,445.25
30" Paved Inv. C.M.P. (Fully Coated) 14 Gage	8.50	206 LF	1,751.00
36" Paved Inv. C.M.P. (Fully Coated) 12 Gage	11.50	174 LF	2,001.00
42" Paved Inv. C.M.P. (Fully Coated) 12 Gage	15.00	160 LF	2,400.00
48" Paved Inv. C.M.P. (Fully Coated) 8 Gage	22.00	242 LF	5,324.00
18" x 11" Paved Inv. C.M.P. Arch With Intgs. Base (FC) 14 Gage	4.50	140 LF	630.00
Class "A" Concrete	55.00	875 CY	48,125.00
Reinforcing Steel Bars	.13	216,000 LB	28,080.00
8" Plain Con. Pipe Perf.	1.35	1,888 LF	2,548.80
Crushed Stone & Sand (Underdrain)	7.50	559 CY	4,192.50
Crushed Stone (Culvert)	4.50	8,050 Tons	36,225.00
Special Rock Fill	.72	128,558 CY	88,961.76
Water for Spec. Comp. & Dust Pal.	2.00	471 MG	942.00
Temp. Fence	.15	6,067 LF	910.00
Engineering Field Office	3,000.00	66.7 %	2,001.00
Construction Layout Stakes	10,000.00	70.0 %	7,000.00
Change Order No. 1 42" Paved Inv. C.M.P. (Fully Coated) 12 Gage	15.00	58 LF	870.00
Force Account No. 1	990.43		990.43
Change Order No. 2 (steel)			
TOTAL AMOUNT			$970,677.59
Five Percent (5%) Retained			48,534.88

That the total amount retained therefor was $48,534.88. Petitioner says that under the contract he had the right to be paid the retainage therefor totalling $48,534.88. Petitioner further says that said retainage represents five per cent (5%) of the work, services, labor and material comprehended in said items so certified.

2. That Petitioner's work, services, labor and material comprehended in the aforesaid five percent (5%) of each of the above items so certified, were property within the guarantees of the Federal Constitutional provisions aforementioned, and upon the performance and supplying thereof

and the abrogation of Petitioner's contract by Respondents, it became and thereafter was the duty of the Respondents not to deprive Petitioner of his right of property therein without due process of law nor take and appropriate such for public use without just compensation.

X

THE ALLEGED DEFAULT

A.

1. In July, 1962, Respondents advised Petitioner that the progress on the work had not been satisfactory, and threatened to take the project from Petitioner. All of Respondents objections to Petitioner's work were without substance. By letter dated August 21, 1962, Respondents notified Petitioner that they had defaulted his contract.

2. Respondents shortly thereafter arbitrarily refused to provide payment to Petitioner for the Borrow which Respondents had previously directed Petitioner to place in the project; and arbitrarily forbid him to do any of the other items of work which it was Petitioner's right to prosecute; and arbitrarily demanded that Petitioner forthwith proceed with replacing the Special Rock Fill which it had improperly ordered him to remove; and Respondents having theretofore agreed to take steps to allow Petitioner on a portion of the adjoining project so that Special Rock Fill material could be obtained therefrom, refused to do so; that Respondents of their own volition resampled the source on the adjoining project which it had previously approved as suitable, and arbitrarily declared it unsuitable, when in fact it was suitable; that Petitioner had no approved material which he could immediately place in the Special Rock Fill; that Respondents then ordered Petitioner from the project, and when he continued to work the items which could still be performed, removed the Project Engineer so he could proceed no further.

B.

1. Petitioner claims that Respondents were without right or authority in holding Petitioner to be in alleged default of said contract, and in ordering Petitioner from the project, and that in so doing they acted arbitrarily and capriciously for the following reasons:

(1) That by wrongfully, arbitrarily and capriciously refusing to provide Petitioner with Borrow change orders, and by refusing to pay Petitioner for the Borrow which he had placed in said roadway under the direction and supervision of Respondents, Respondents, were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(2) That by wrongfully, arbitrarily and capriciously compelling Petitioner, under threat of shut-down for non-compliance, to blend unsuitable material with suitable material in an attempt to upgrade its quality, and without providing for payment to him for such operation, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(3) That by wrongfully, arbitrarily and capriciously compelling Petitioner, under threat of shut-down for non-compliance, to remove 51,442 cubic yards of Special Rock Fill as unsuitable material, which material was in fact suitable, and which Respondents had previously approved and had directed and supervised its placement, without providing for payment to Petitioner for such removal, and in backcharging him for the amount already paid for its placement, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(4) In wrongfully, arbitrarily and capriciously compelling Petitioner, under threat of shut-down for non-compliance, to immediately proceed with replacing the Special Rock Fill, to the exclusion of the other items of work, the performance of which was his right, and after Petitioner had already once placed

such fill with suitable material, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(5) That by wrongfully, arbitrarily and capriciously delaying Petitioner in his performance of the work, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(6) In inducing Petitioner to rely on traversing part of the adjoining project so that he might secure Special Rock Fill, and then wrongfully, arbitrarily and capriciously precluding him from securing it and immediately demanding that he forthwith replace the Special Rock Fill, the Respondents failed to cooperate and were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(7) That by wrongfully, arbitrarily and capriciously refusing to pay Petitioner for all of the Unclassified Excavation, and for the work performed as set forth in Paragraph II C 3 Subparagraph (4), Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

And although requested so to do, Respondents wrongfully refused to rescind their notice of alleged default.

C.

1. Petitioner says Respondents had no right or authority to abrogate his contract and that the same was done wrongfully, arbitrarily and capriciously, and that Petitioner had the right to complete said contract and that the same would have been completed by him but for the arbitrary and capricious actions of Respondents.

2. Petitioner further says that under the contract Respondents were without right or authority in failing to certify, and had a duty to certify, the performance of the items of work, services, labor and materials performed and

supplied by him, and the amounts due therefor, as referred to in the number paragraphs above:

Paragraph	IV, C 1	$ 64,377.00
Paragraph	V, A 2	37,038.24
Paragraph	V, A 2	102,884.00
Paragraph	V, A 3	26,312.40
Paragraph	VI, A 1	146,411.51
Paragraph	VI, B 1	156,300.00
Paragraph	VII, A 1	681,881.57
Paragraph	VII, A 1	95,000.00
Paragraph	VIII, A 1	28,306.95
Paragraph	IX, A 1	48,534.88
TOTAL		$1,387,046.55

And Petitioner says that under the contract he has a right to be paid the said sum of $1,387,046.55 for the work, services, labor and materials performed and supplied by him and incorporated in the public highway as hereinabove set forth; that the Respondents have no right or authority to withhold payment of the above sums for such work, services, labor and materials, and have a duty to certify and issue requisitions for the payment thereof upon the State Auditor; and that the same has not been done and that the same have not been paid; the same is past due and owing from Respondents to Petitioner, and although payment has been requested, the Respondents have denied Petitioner's right to payment and have refused certification of the performance and the issuance of requisitions for payment thereof upon the State Auditor, and that said services, labor and materials are of the value of $1,387,046.55.

3. Petitioner further says that he has a right of property in the contract aforesaid and in its completion, and a right of property in all of the work, services, labor and materials performed by him and incorporated in the public highway, and that Respondents, NOTWITHSTANDING their duties not to deprive Petitioner of his property without due process and not to take such property for public use without just

compensation as guaranteed by the Federal constitution provisions aforementioned, did wrongfully abrogate said contract and deprive Petitioner of his property right therein, and did wrongfully take and appropriate his work, services, labor and materials incorporated in the public highway and deprive Petitioner of his property therein without due process and did take same for public use without just compensation in violation of the Federal constitutional provisions aforementioned, and NOTWITHSTANDING Respondents' further duty, in the premises of the duties aforesaid, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property taken and appropriated by them for public use, Respondents although requested so to do, have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioner and pay him just compensation therefor.

PRAYER

WHEREFORE, your Petitioner prays that a writ of mandamus be issued, directed to The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, commanding them forthwith to institute in the Circuit Court of Cabell County, West Virginia, a proceeding to acquire from Petitioner under the authority of eminent domain, the following property belonging to Petitioner:

1. Petitioner's rights in the contract aforementioned;
2. Petitioner's work, services, labor and materials incorporated in the public highway in Cabell County, West Virginia, and taken and appropriated by Respondents for public use, and being abbreviatedly described in the terms of said contract as follows:
   a. 69,975 cubic yards of Borrow, referred to in Paragraph IV C 1 hereinabove
   b. 51,442 CY of Special Rock Fill referred to in Paragraph V A 1

c. Removal of 51,442 CY of Special Rock Fill, referred to in Paragraph V A 1

d. 36,545 CY of Special Rock Fill, referred to in Paragraph V A 3

e. 298,799 CY of Unclassified Excavation referred to in Paragraph VI A 1

f. 312,600 CY of Blending referred to in Paragraph VI B 1

g. Rental of Equipment referred to in Paragraph VII A 1

h. Stand-by Services, (exclusive of equipment rental), referred to in Paragraph VII A 1

i. 3,216 CY Structure Excavation referred to in Paragraph VIII A 1

j. 16 CY Class A Concrete referred to in Paragraph VIII A 1

k. 486 CY Crushed Stone, Sand or Gravel in Underdrains referred to in Paragraph VIII A 1

l. 459 tons Crushed Stone, Sand or Gravel for Culvert Foundation, referred to in Paragraph VIII A 1

m. 100% Services Maintaining Traffic referred to in Paragraph VIII A 1

n. 2,433 LF Temporary Fence, referred to in Paragraph VIII A 1

o. 1/3 of Services Maintaining Engineer Field Office referred to in Paragraph VIII A 1

p. 30% of Construction Lay-out Stakes referred to in Paragraph VIII A 1

q. 1,064 LF of 24" Paved Invert CMP 14 ga. as referred to in Paragraph VIII A 1

r. 5% of Aggregate of items and quantities thereof certified for payment as referred to in Paragraph IX A 1

and to that end a rule may be issued against them commanding them to appear before this Court on the 15th day of January, 1966, and show cause, if they or either of them can, why they should not do so; and grant unto your Petitioner such other and further relief as the Court may deem proper and as the law may require, and as in duty bound your Petitioner will ever pray, etc.

And for such other and further relief so aforesaid, Petitioners pray in the alternative, that in the event the remedy of mandamus to compel the Road Commissioner to institute proceedings in eminent domain as represented by the Attorney General of the State to the United States Supreme Court as being a proper and available remedy, be deemed improper and unavailable by the Court, that the petition herein be taken and treated as a proceeding for declaratory judgment under Article 13, Chapter 55 of the Code of West Virginia, 1931, as Amended, and Rule 57 of the Rules of Civil Procedure, and that the Court will:

1. Declare that said contract is not in default by Petitioner;
2. Declare the rights of the Petitioner under and in said contract;
3. Declare the right of Petitioner to have the Road Commissioner certify the performance of said quantities of work, services, labor and material which are completed, unpaid, and appropriated for public use, and issue a requisition for the payment thereof upon the State Auditor;

and for further and coercive relief;

1. That the Road Commissioner be compelled to cancel and set aside for naught any such part of the records of the Road Commission as may show said contract in default;
2. That the Road Commissioner be compelled to perform his duty to certify the performance of the work, services, labor and materials performed and supplied by Petitioner and the amount due therefor, and be

compelled to issue the requisition of the Road Commission to the State Auditor for payment thereof; and

3. For such other and further relief, both general and special, as to the Court may seem appropriate in the premises of this alternative prayer.

HOWARD PRICE dba
HOWARD PRICE AND COMPANY
Petitioners
By Counsel

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia
Counsel for Petitioner

STATE OF WEST VIRGINIA
COUNTY OF CABELL, to wit:

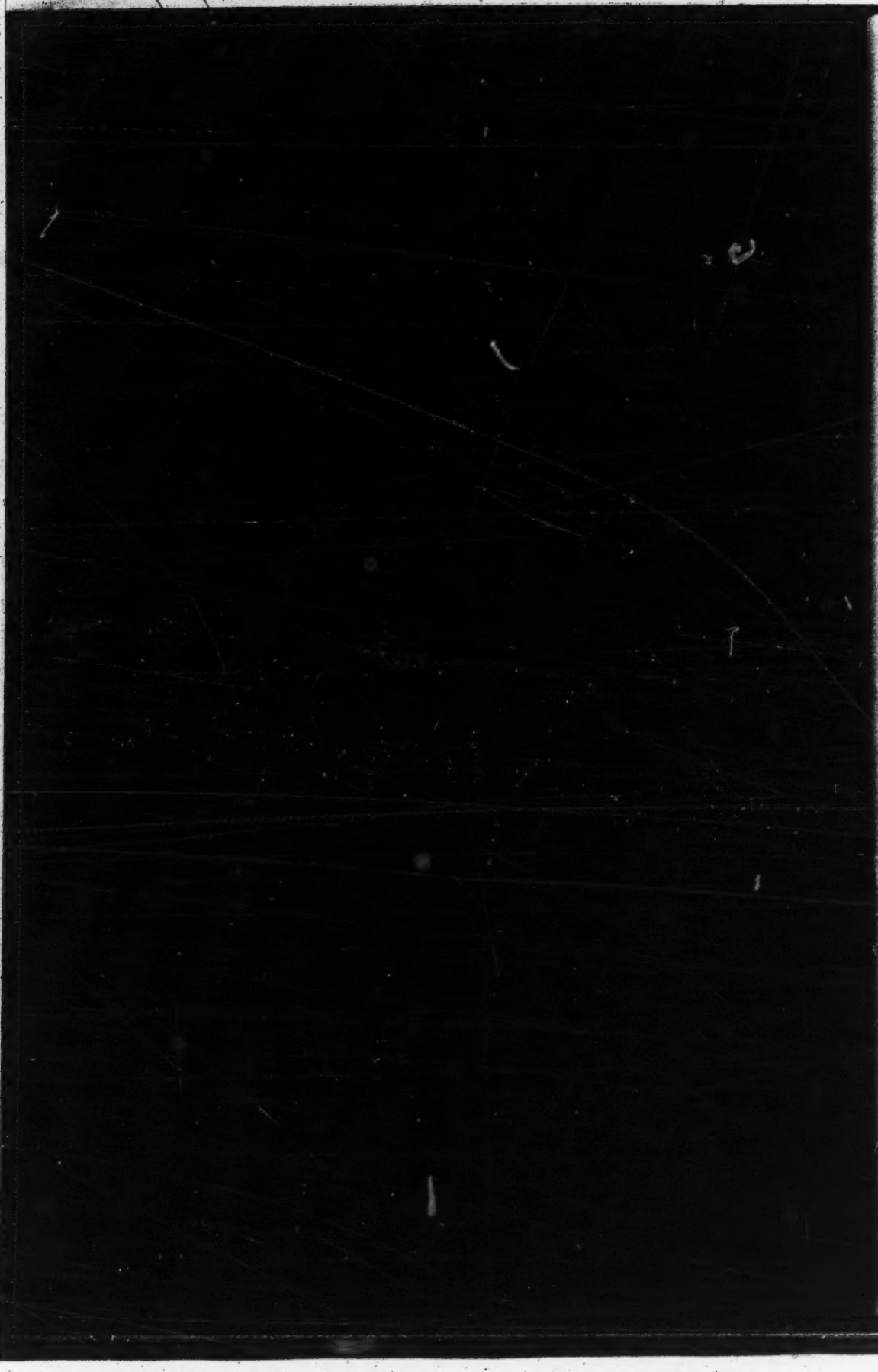
Howard Price, dba Howard Price and Company, the Petitioner named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except as far as they are therein stated to be on information, and that so far as they are therein stated to be on information, he believes them to be true.

/s/ HOWARD PRICE
HOWARD PRICE dba
HOWARD PRICE AND COMPANY

Taken, sworn to and subscribed before me this 14th day of December, 1965.

My Commission expires March 19, 1969.

/s/ L. J. MESSEL
Notary Public



No. _____

IN THE

Supreme Court Of The United States

October Term, 1966

HOWARD PRICE d/b/a HOWARD PRICE AND COMPANY,

Appellant,

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation, and BURL A. SAWYERS, as State Road Commissioner,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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MOTION TO DISMISS

Appellees, pursuant to Rule 16(1) (b) of the Revised Rules of the Supreme Court of the United States, move that appellant's appeal be dismissed on the ground that the judgement of the Circuit Court of Kanawha County, West Virginia rests on an adequate non-federal basis.

STATEMENT OF THE CASE

In 1960, appellant entered into a contract with the State Road Commission of West Virginia for construction work on a portion of Interstate Highway 64. Subsequently, the Road Commission, appellee herein, declared appellant's performance to be in default and caused appellant to be removed from the project. The sequence of events described in appellant's jurisdictional statement on pages 1 and 2 are substantially correct.

As noted by appellant on page 3 of his jurisdictional statement, he filed a petition for mandamus in the Circuit Court of Kanawha County, West Virginia, seeking to compel appellees herein to institute proceedings in eminent domain to condemn his property, allegedly taken without due process. The sequence of events noted on page 3 of appellant's jurisdictional statement is correct.

ARGUMENT

I

It is true that the Circuit Court of Kanawha County up-

held the constitutionality of Article VI, Section 35 of the Constitution of West Virginia against appellant's repeated assertion of its repugnancy to the 14th Amendment to the United States Constitution. However, as will be shown, the judgment rested on an adequate non-federal ground, independent of the "immunity" clause of the State Constitution. With an adequate non-federal ground to support the judgment, review by this Court is precluded. Fox Film Corporation v. Muller, 296 U. S. 207.

It is suggested that the Circuit Court of Kanawha County principally based its decision on the fact that eminent domain would not lie in a case such as was presented. In the court's opinion, noted at page 89a of appellant's jurisdictional statement, it is stated: "* * * However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding * * *." And, at page 90a, the court said: "* * * I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here." The Circuit Court of Kanawha County, construing the Constitution of West Virginia as it relates to eminent domain, decided that such proceedings were not proper in a contract dispute. The Court also noted that mandamus would not lie in any circumstance where there is no clear legal right to the writ.

II

As appellant has stated, this Court dismissed appellant's former appeal in a per curiam opinion at 282 U. S. 20. This

Court stated: "The motion to dismiss is granted and the appeal is dismissed in light of the representations of the Attorney General of West Virginia that there is open to the appellant an effective state procedure of which he has not availed himself." Appellees' former motion to dismiss, reproduced starting at page 75a of appellant's jurisdictional statement, suggested that two remedies existed; (1) the eminent domain proceeding, and (2) a claim against the State under the provisions of Chapter 14, Article 2, of the West Virginia Code. (See pages 81a, 82a and 83a of appellant's jurisdictional statement.) This Court, in its per curiam opinion (382 U. S. 20), did not state which of the two suggested remedies would be correct. Appellant has tried the eminent domain route and found it barred. Now, he should exhaust the remedy provided by the State and prosecute his claim against the State.

The Legislature of the State of West Virginia, in its 1967 session, established and created a "Court of Claims." The official acts of the Legislature have not yet been codified so the only available reference source is the bill as enrolled in the office of the Secretary of State. The bill, Enrolled Senate Bill No. 332, was passed March 11, 1967 and becomes effective on July 1, 1967. The complete bill is set out in Appendix A to this motion to dismiss. Now, appellant cannot complain that he is forced to submit his claim to the Attorney General, who formerly acted as an administrative agency of the Legislature in the processing and hearing of claims against the State. Under the provisions of the legislation, appellant as a claimant is entitled to a full evidentiary hearing before the Court of Claims.

It is recognized that the Court of Claims' findings are

not binding on the Legislature. It is, however, the remedy which the State has provided in cases such as the one herein. Appellant has been told that he cannot proceed by way of declaratory judgment or by way of eminent domain. It is apparent that the Court of Claims was created for just such a situation as here exists. Indeed, Section 1 of the bill (Appendix A) provides that "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state * * * cannot be determined in the regular courts of the state * * *." The Legislature thus recognized and specifically approved of the immunity clause. In Cunningham v. County Court of Wood County, 148 W.Va. 803, 134 S.E. 2d 725, the West Virginia Supreme Court of Appeals, in 1964, considered the doctrine of sovereign immunity. "* * * Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

CONCLUSION

It is respectfully submitted that the judgement appealed from rests on an adequate non-federal ground and that appellant has available an adequate state remedy which

he has not pursued. Therefore, it is submitted and argued that the appeal should be dismissed.

Respectfully submitted,

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STATE OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

GEORGE H. MITCHELL
ASSISTANT ATTORNEY GENERAL
STATE OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

APPENDIX A

ENROLLED

Senate Bill No. 332

(By Mr. Jackson)

[Passed March 11, 1967; in effect July 1, 1967.]

AN ACT to repeal sections one, three, four, five, six, seven, eight, nine, ten, eleven and twelve, article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend said article two by adding thereto twenty-eight new sections, designated sections one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, creating a court of claims; providing a legislative purpose and definition; providing for a clerk and other employees thereof;

the terms and meeting place of said court, the compensation, oath and qualifications of the judges thereof; providing the general powers and jurisdiction of the court; establishing exclusions to the jurisdiction; providing for the rules of practice and procedure; establishing a regular procedure, shortened procedure, and advisory determination procedure; providing for claims under existing appropriations and special appropriations; establishing a period of limitation; providing for compulsory process, inclusion of awards in the budget, records to be preserved, and for the reports of the court; prohibiting fraudulent claims and providing a penalty and forfeiture upon conviction thereof; providing for the conclusiveness of the court's determination; specifying policy concerning awards; providing for representation of the state by the attorney general; and providing a severability clause.

Be it enacted by the Legislature of West Virginia:

That sections one, three, four, five, six, seven, eight, nine, ten, eleven and twelve, article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed, and to amend said article two by adding

thereto twenty-eight new sections designated sections one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, to read as follows:

ARTICLE 2. CLAIMS AGAINST THE STATE.

§14-2-1. Purpose.

The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in the regular courts of the state; and to provide for proceedings in which the state has a special interest.

§14-2-3. Definitions.

For the purpose of this article:

"Court" means the state court of claims established by section three of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of state government: *Provided*, That a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of the state regardless of any state aid that might be provided.

§14-2-4. Creation of court of claims; appointment and terms of judges.

The "Court of Claims" is hereby created. It shall consist of three judges, to be appointed by the president of the Senate and the speaker of the House of Delegates, by and with the advice and consent of the Senate, one of whom shall be appointed presiding judge. Each appointment to the court shall be made from a list of three qualified

nominees furnished by the board of governors of the West Virginia state bar.

The terms of the judges of this court shall be six years, except that the first members of the court shall be appointed as follows: One judge for two years, one judge for four years and one judge for six years. As these appointments expire, all appointments shall be for six-year terms. Not more than two of the judges shall be of the same political party. An appointment to fill the vacancy shall be for the unexpired term.

§14-2-5. Court clerk and other personnel.

The court shall have the authority to appoint a clerk. The clerk's salary shall be fixed by the joint committee on government and finance, and shall be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards.

The joint committee on government and finance may employ other persons whose services shall be necessary

1) to the orderly transaction of the business of the court, and
2) to their compensation.

§142-6. Terms of court.

The court shall hold at least two regular terms each year, on the second Monday in April and September. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the court whenever the number of claims awaiting consideration, or any other pressing matter of official business, make such a term advisable.

§142-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the state, the court may convene at any county seat.

§142-8. Compensation of judges; expenses.

[illegible] receive [illegible] dollars [illegible] and actual expenses

incurred in the performance of his duties. The number of days served by each judge shall not exceed a hundred in any fiscal year, except by authority of the joint committee on government and finance. Requisitions for compensation and expenses shall be accompanied by sworn and itemized statements, which shall be filed with the auditor and preserved as public records. For the purpose of this section, time served shall include time spent in the hearing of claims, in the consideration of the record, in the preparation of opinions, and in necessary travel.

§14-2-9. Oath of office.

Each judge shall before entering upon the duties of his office, take and subscribe to the oath prescribed by article four, section five of the constitution of the state. The oath shall be filed with the clerk.

§14-2-10. Qualifications of judges.

Each judge appointed to the court of claims shall be an attorney at law, licensed to practice in this state, and shall have been so licensed to practice law for a period of not less than ten years prior to his appointment as judge. A judge shall not be an officer or an employee of any

branch of state government, except in his capacity as a member of the court, and shall receive no other compensation from the state or any of its political subdivisions. A judge shall not hear or participate in the consideration of any claim in which he is interested personally, either directly or indirectly.

§14-2-11. Attorney general to represent state.

The attorney general shall represent the interests of the state in all claims coming before the court.

§14-2-12. General powers of the court.

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or for some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state. No liability shall be imposed upon the state or any state agency by a determination of the court of claims approving a claim and recommending an award, unless the claim is (1) made under an existing appropriation, (2) in accordance with section eleven of this article, or (3) [illegible] a special appropriation, as provided

in section twenty of this article. The court shall consider claims in accordance with the provisions of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. Each claim shall be considered by the court and if, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

§14-2-13. Jurisdiction of the court.

The jurisdiction of the court, except for the claims excluded by section fourteen, shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contracto and ex delicto, against the state or any of its

agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

§14-2-14. Claims excluded.

The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

2. For a disability or death benefit under chapter twenty-three of this code.

3. For unemployment compensation under chapter twenty-one-a of this code.

4. For relief or public assistance under chapter nine of this code.

5. With respect to which a proceeding may be maintained against the state, by or on behalf of the claimant in the courts of the state.

§14-2-15. Rules of practice and procedure.

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims. Rules shall permit a claimant to appear in his own behalf or be represented by counsel.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of a claim.

§14-2-16. Regular procedure.

The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and

shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine

or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

§14-2-17. Shortened procedure.

The shortened procedure authorized by this section shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-15. Advisory determination procedure.

The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the state or a state agency. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk, the record of the claim including a full statement of the facts, the conten-

tions of the claimant, and such other materials as the rules of the court may require. The record shall submit specific questions for the court's consideration.

2. The clerk shall examine the record submitted and if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When a claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim. An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be de novo.

§14-3-19. Claims under existing appropriations.

A claim arising under an appropriation made by the Legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the appropriate state agency, the state auditor, and to the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to

further review by the auditor upon any matter determined and certified by the court.

§14-2-20. Claims under special appropriations.

Whenever the Legislature makes an appropriation for the payment of claims against the state, then accrued or arising during the ensuing fiscal year, the determination of claims and the payment thereof may be made in accordance with this section. However, this section shall apply only if the Legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award, and requisition relating thereto, to the auditor. The auditor thereupon shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim or claim except for the question of a sufficient unexpended balance in the appropriation.

§14-2-21. Periods of limitation made applicable.

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article, unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corporation and the constitutional immunity of the state from suit were not involved; but the foregoing provision shall not be held to limit or restrict the right of any person, firm or corporation who or which has a claim against the state or any state agency, pending before the attorney general on the effective date of this article, from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim as may be, on the effective day of this article, pending in any court of record as a legal claim and which, after such date, may be established in such court to be invalid as a claim against the state because of the constitutional immunity of the state from suit.

§14-2-22. Compulsory process.

In all hearings and proceedings before the court, the evidence and testimony of witnesses and the production of documentary evidence may be required. Subpoenas may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a subpoena or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

§14-2-23. Inclusion of awards in budget.

The clerk shall certify to the director of the budget, on or before the twentieth day of November of each year, a list of all awards recommended by the court to the Legislature for appropriation. The clerk may certify supplementary lists to the board of public works to include all-

sequent awards made by the court. The board of public works shall include all awards so certified in its proposed budget bill transmitted to the Legislature.

§14-2-24. Records to be preserved.

The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the Legislature or any committee thereof for the reexamination of the claim.

§14-2-25. Reports of the court.

The clerk shall be the official reporter of the court. He shall collect and edit the approved claims, awards and statements, and shall prepare them for publication and submission to the Legislature in the form of an annual report.

Claims and awards shall be separately classified as follows:

(1) Approved claims and awards not satisfied but reported to the Legislature for final consideration and appropriation;

2. Approved claims and awards satisfied by payments out of regular appropriations.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the fiscal year.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its annual report to the presiding officer of each house of the Legislature. The annual reports of the court shall be published by the clerk as a public document.

§14-2-20. Fraudulent claims.

A person who knowingly and willfully presents or attempts to present a false or fraudulent claim, or a state officer or employee who knowingly and willfully participates or assists in the preparation or presentation of a false or fraudulent claim, shall be guilty of a misde-

manner. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer or employee, he shall, in addition, forfeit his office or position of employment, as the case may be.

§14-2-27. Conclusiveness of determination.

Any final determination against the claimant on any claim presented as provided in this article shall forever bar any further claim in the court arising out of the rejected claim.

§14-2-28. Award as condition precedent to appropriation.

It is the policy of the Legislature to make no appropriation to pay any claims against the state, cognizable by the court, unless the claim has first been passed upon by the court.

§14-2-29. Severability.

If any provisions of this article or the application thereof to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications

of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

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No. 176

IN THE

Supreme Court of the United States

October Term, 1967

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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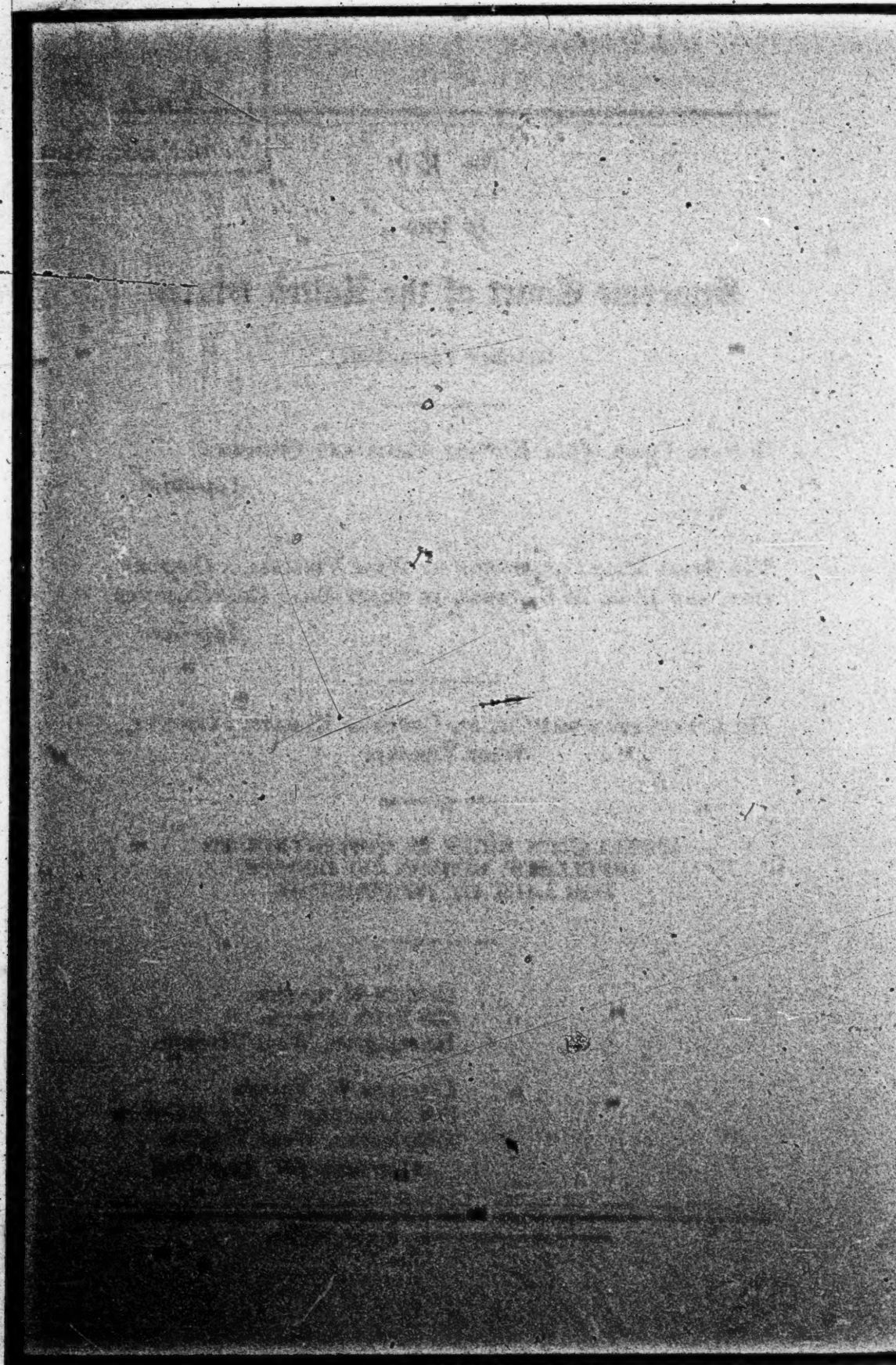

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Appellees

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

STATEMENT OF THE CASE

The petition avers, and for jurisdictional purposes here as well as on the demurrer in the trial Court, it must be taken as true, *Ickes v. Fox*, 300 U.S. 82, 96, that by arbitrary action of the State Road Commissioner under color of office and without authority, the Road Commission wrongfully abrogated Appellant's interstate highway construction contract, put him off the project, and appropriated his work, services, labor, and material of the value of $1,387,046.55 which were incorporated in the public highway for public use. The petition was to compel the Appellees to institute eminent domain proceedings to legally acquire and pay for Appellant's property. *The appropriation of Appellant's property for public use without compensation and without due process of law is the major thrust of Appel-*

lant's petition. Appellees met Appellant's charges with a demurrer, interposing as a bar the absolute immunity provision of Section 35, Article VI, of the State Constitution. *The trial Court applied the immunity provision to this case* and turned Appellant out of Court.

ARGUMENT

I

APPELLEES' CONTENTION OF ADEQUATE NON-FEDERAL GROUND IS FRIVOLOUS AND WITHOUT MERIT

Appellees rest this contention on the fact that the trial Court held this was not a proper "subject" for an eminent domain proceeding. However, such holding (Juris. Statement, Appendix D, Letter Opinion Of Trial Court dated March 11, 1966, pp. 89a, 90a) is based upon, and the result of, the interposition of the State Constitutional immunity provision, *the application of which to the facts of this case is the very Federal ground on which this appeal is taken.* This proceeding from its inception and on this appeal, has been focused on the clear conflict between Appellant's Federal constitutional rights and the application of the State constitutional immunity provision, the latter of which under the Supremacy Clause of Article VI, Clause 2, of the Federal Constitution, must give way. *Hamm* v. *City of Rock Hill*, 379 U.S. 306; *Hill* v. *Florida*, 325 U.S. 538; *Pardee* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184.

Appellees' contention begs the very question which Appellant seeks to have determined. It ill becomes Appellees to challenge the propriety of the very remedy which it represented in the prior appeal to be proper and available. (Juris. Statement, Appendix B, Motion To Dismiss, pp. 79a, 84a). Constitutional rights are not so ephemeral as to be resolved by such trifling expediency.

II

THE POSSIBILITY OF A LEGISLATIVE GRATUITY IS NOT A REMEDY AND DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS

Appellees repudiated in the trial Court their representations to this Court in the prior appeal that this mandamus proceeding is an effective State remedy. They now have the temerity to come again in this Court and brazenly suggest that Appellant should try another of Appellees' "remedies". Appellees' demurrer was not grounded on choice of remedy, but solely on the trial Court's lack of jurisdiction to afford any judicial remedy to Appellant on the basis of the constitutional immunity provision. *It is both the previous declaratory judgment proceeding and in this mandamus proceeding, the trial Court has held Appellant has no remedy whatsoever.*

Appellees contend that effective July 1, 1967, with the creation of the "Court of Claims" (Chap. 14, Art. 2, Code of West Virginia, 1931, As Amended By Enrolled Senate Bill 332, West Virginia Legislature, 1967), Appellant can now present his claim to such "Court". This is patently an *ad hoc* argument to try to again avoid this Court's jurisdiction. The newly established "Court Of Claims" *is not a judicial body.* It is not a part of the judicial branch of the state government, *but is simply an advisory body to the Legislature.* It considers and advises the Legislature on claims which the Legislature *might* deem moral obligations. *There is no appeal from the "Court's" advice to the Legislature or the Legislature's action or lack of action on such advice.* Appellees recognize its lack of effectiveness with their statement that "the Court of Claims findings are not binding on the Legislature". (Motion To Dismiss Appeal, p. 3).

Appellees now say that it is the only "remedy" which the State has provided in such a case as at bar. We submit that *it is no remedy at all,* and that it is the very lack of

an effective State remedy, *by reason of the application of the constitutional immunity provision*, as has already been twice patently determined by the State judiciary, which is the gist of this appeal.

Appellees' suggestion is that Appellant may pursue his claim solely as a *moral obligation* of the State, and not as a *legal right*. It should be noted that the statute relating to claims before the "Court Of Claims" *expressly excludes* any claim:

> "5. With respect to which a proceeding may be maintained against the state by or on behalf of the claimant in the courts of the state".

Thus, *all other considerations aside, it is apparent that Appellees' suggestion begs the question as to whether Appellant should be provided a judicial forum in order to enforce his rights, for by the very terms of the statute, the procedure cannot be availed of if a judicial remedy is proper.*

This statute provides for the presentation of a claim to the "Court Of Claims" to the end that it *may, in its discretion*, recommend to the Legislature that such claim be recognized as a *moral obligation* of the State, and for which the Legislature *may, in its discretion*, make an appropriation for its satisfaction on the basis of the complete absence of any judicially recognizable legal right.

It has been held insofar as Federal officials are concerned, that in the event of abuse of power of office, a claimant will not be relegated to a court of claims. *Land* v. *Dollar*, 330 U.S. 731, 738. This is especially true in cases such as at bar, for constitutional rights are peculiarly within the sphere of judicial protection. The Constitution which guarantees Appellant's rights, likewise insures them the privilege of having those rights *judicially protected*. *Lawrence* v. *State Tax Comm.*, 286 U.S. 276.

What Appellees are in essence suggesting, is that Appellant *be denied the judicial forum* and forced to submit the protection of his property and his constitutional rights to the *whim and caprice of the legislative political arena from which there can be no appeal.* It is a *cul de sac.*

Appellant's constitutional rights of due process and protection of his property against public use without compensation are not to be so lightly treated. A recommendation by a "Court Of Claims", in its discretion to be *made or denied,* for a legislative gratuity, in its discretion to be *given or withheld,* by its inherent limitation, is not and cannot be due process of law. The Rule Of Men as expressed in legislative discretion cannot be substituted for the Rule Of Law guaranteed by the principles of due process.

CONCLUSION

Probable jurisdiction should be noted; the judgment of the trial Court reversed; and this Court should enter, or direct the trial Court to enter, an order compelling Appellees to institute an eminent domain proceeding to acquire Appellant's property as sought in the mandamus petition.

July 3, 1967.

Respectfully submitted,

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No. 1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

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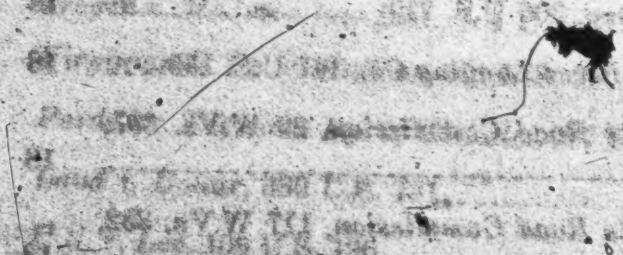

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

The subject on appeal in this mandamus proceeding was previously the subject of an appeal to this Court in a declaratory judgment proceeding from the same State Court, on the same Federal questions, and on the trial Court's similar action of dismissal on the ground it was an action against the state and prohibited by the *state constitutional immunity provision* (previous Jurisdictional Statement, Appendix A). *R. C. Wetherall, Jr., et al., v. The State Road Commission of West Virginia, et al.*, 382 U.S. 45 (1965).

On Appellees' Motion To Dismiss Appeal in the previous proceeding, the Attorney General of West Virginia *represented to this Court that Appellants had available in the State Court an adequate remedy in the form of a mandamus proceeding to compel the institution of eminent domain proceedings to acquire Appellants' property which was ap-*

propriated by The State Road Commission. (Motion To Dismiss Appeal in previous proceeding, Appendix B). This Court sustained Appellees' Motion and dismissed the appeal in the previous proceeding on the authority of its *per curiam* opinion in the companion case of *Howard Price, etc.* v. *The State Road Commission of West Virginia, et al.*, 382 U.S. 20 (1965) wherein the appeal had been dismissed *"in the light of the representations of the Attorney General of West Virginia that Appellant had an effective State procedure of which he had not availed himself"*, (382 U.S. 20, Appendix C). Pursuant to the representations of the Attorney General to this Court, Appellants instituted this *mandamus proceeding to compel the institution of eminent domain proceedings.* Appellees, by demurrer in this mandamus proceeding, then *repudiated* the representations of the Attorney General to this Court, and *on the same grounds* on which it dismissed the declaratory judgment proceeding, the Trial Court *dismissed this mandamus proceeding.* The subject matter and same Federal questions now come again before this Court. This controversy has been in the courts since September 24, 1963.

This appeal presents another and a complementary aspect of the denial of due process in the handling of The State Road Commission's highway construction contracts as contained in the companion appeal now pending in this Court styled *Howard Price dba Howard Price and Company* v. *The State Road Commission of West Virginia, a corporation, et al.* While the cases are factually different, they both involve the taking by the State of a contractor's work and materials as incorporated in public projects and denying him a day in Court to establish and enforce his rights.

Appellants, R. C. Wetherall, Jr., and Paul Price, appeal from the judgment of The Circuit Court of Kanawha County, West Virginia, entered on June 25, 1966, dismissing Appellants' petition in mandamus on the ground

it constituted a suit against The State of West Virginia. On petition for writ of error, timely filed, The Supreme Court of appeals of West Virginia, by order entered December 5, 1966, refused to review the judgment; and on a second petition, timely filed, said Court by order entered February 20, 1967, again refused to review the judgment and returned the record to The Circuit Court of Kanawha County. The time for re-petitioning for writ of error has expired. Appellants submit this statement to show that The Supreme Court of The United States has jurisdiction of the appeal and that substantial Federal questions are presented.

OPINION BELOW

The letter opinion of The Circuit Court of Kanawha County, West Virginia, dated March 11, 1966, is not reported. A copy of the opinion was made part of the record of the proceeding and is attached hereto as Appendix D. A copy of the letter opinion of the same date of the same court in the companion case of *Howard Price, etc.* v. *The State Road Commission et al,* referred to in the opinion in this case and by the Court's direction made a part of the record in this case, is also attached hereto as Appendix E.

JURISDICTION

Appellants filed their petition in mandamus in The Circuit Court of Kanawha County, West Virginia, on January 5, 1966. The petition sought to compel The State Road Commission of West Virginia and the Road Commissioner to institute eminent domain proceedings to acquire Appellants' materials, work, labor and services incorporated into a public dam pursuant to a highway and dam construction contract and which property of Appellants was appropriated by the Road Commission and the Road Commissioner without payment. It asked for other appropriate relief, including alternatively, a declaration of the rights of Appellants under the construction contract and upon such

declaration of rights, compulsion of the Road Commissioner to perform his statutory duty to audit Appellants' claim for work and materials performed and supplied. By the alternative prayer, for relief, Appellants incorporated in this mandamus proceeding a prayer for a declaration of rights such as was sought in the previous declaratory judgment proceeding, which in effect, again submits the propriety of declaratory relief for judicial consideration. On June 25, 1966, the Court entered its final judgment order sustaining Appellees' demurrer and dismissed the proceeding as a suit against the State. This is the judgment upon which review is sought. (Appendix F).

Appellants thereupon filed their petition for writ of error to The Supreme Court of West Virginia on August 24, 1966. On December 5, 1966, The Supreme Court of Appeals of West Virginia, entered its order refusing to review the case (Appendix G) and on second petition for writ of error, said Court on February 20, 1967, again refused to review the case (Appendix H). The time for re-petitioning had expired and the record was returned to The Circuit Court of Kanawha County.

Notice of Appeal to The Supreme Court of The United States was filed with The Circuit Court of Kanawha County on April 17, 1967.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by Title 28, United States Code Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment and the commerce clause of Section 8, Article I, of the Federal Constitution, on the facts of the case, is within the purview of such section *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall. 661; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U. S.* v. *County of Allegheny*, 322

U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginia R. Co.* v. *Mullens*, 271 U.S. 220.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Parden* v. *Terminal Railway of Alabama State Docks*, 377 U.S. 184; *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Rolston* v. *Crittenden*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISION INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted to voters; Ratified 1936. (The amendment added an exception pertaining only to garnishment which is not here relevant):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code (unofficial) conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES.—The State Road Commission of West Virginia, heretofore created and *existing as a corporation,* shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code, (1966), p. 7) (Italics supplied.)

• • •

2. The following statutes are also pertinent as pertaining to the Road Commissioner's duty to audit contractor's claims and issue requisitions for their payment; the statutory direction that road construction shall be performed under contract awarded by bid, giving detailed statutory requirements; and the statutory authority for the State Conservation Commission to undertake the construction of slack water dams through the office and facilities of the State Road Commission.

Chapter 17, Code of West Virginia, 1931, as amended:
Article 3, Section 4
Article 4, Sections 19, 20 and 21

Chapter 20, Code of West Virginia, 1931, as amended;
Article 5, Part II, Sections 6, 7, 8, 9, 10
(See Appendix I for pertinent parts of above sections, and official reference to amending Acts of the Legislature).

QUESTIONS PRESENTED

The appeal in the previous declaratory judgment proceeding was dismissed by this Court on Appellees' representations that mandamus to compel eminent domain proceedings was Appellants' effective state remedy (more fully set forth in opening paragraphs of this Jurisdictional Statement, pp. 1, 2). Thereupon Appellants, highway contractors, filed a petition in mandamus against Appellees, The Road Commission and Road Commissioner, to compel them to institute eminent domain proceedings to legally acquire their property in the form of material, work, services, and labor, incorporated in a dam pursuant to a public highway and dam construction contract between Appellant Price and Appellees, and appropriated by Appellees without payment. The cost of the dam was to be paid for by the State Conservation Commission through the Road Commission, and the Federal Government participated in the cost of both the dam and the highway. The contractor was required to bid the dam work under the contract item, "Borrow Pit Excavation", and was paid for such work by Appellees during its progress by a monthly estimate under such item. Appellees collected from the Conservation Commission the amount of money required to pay for the dam as computed under such item and after the work was completed and accepted by Appellees, Appellees arbitrarily deleted the item from the contract and deducted the amount of payments previously paid therefor from money acknowledgedly due for items of highway construction.

Appellees then repudiated their representations to the U. S. Supreme Court and again claimed State immunity by

demurrer to Appellants' petition. The petition in mandamus, in addition to seeking to compel Appellees to institute eminent domain proceedings, asked also for other appropriate relief, including alternatively, a declaration of the rights of the parties, as sought in the previous declaratory judgment proceeding. On Appellees' demurrer, the trial Court again held the proceeding was against the State of West Virginia and *absolutely prohibited*. In the premises, the questions presented are:

1. Were the actions of the Road Commissioner as alleged and the action of the trial Court, in applying the immunity provision of the State Constitution and dismissing the mandamus and alternative declaratory judgment proceeding, repugnant to:

   (1) Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

      (a) constituted a denial of due process of law by the State?

      (b) constituted the taking by the State of private property for public use without just compensation?

      (c) constituted a denial by the State of equal protection of the law?

   (2) Section 8, Article I, of the Federal Constitution on the grounds that they constituted an interference with and burden upon interstate commerce?

2. Does the application by the trial Court, on Appellees' *demurrer*, of the immunity provision of the State Constitution to Appellants' petition for mandamus and alternatively a declaration of rights, and without further proceeding on the merits or an interpretation of the contract, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal questions are initially presented by Appellants' mandamus petition (Appendix J). The mandamus petition alleges in part as follows (Appendix J, p. 98a):

> "That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn *duty to abide by and uphold the Constitution * * * of the United States * * * and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty, or property without due process of law as required by Section 1 of the Fourteenth Amendment to the Federal Constitution * * * nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid.)* * *.* In pursuance of the duties aforesaid, it is the further duty of Respondents to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property taken and appropriated by them for public use." (Emphasis added.)

After alleging the property appropriated by the Appellees, the mandamus petition further charges (Appendix J, p. 108a):

> ". . . that Respondents, NOTWITHSTANDING the fact that the *Road Commission has collected* from the Conservation (Commission) *the money for the payment of such property* and their duties *not to deprive Petitioners of their property without due process and not to take such property for public use without just compensation as guaranteed by the Federal Constitutional provisions aforementioned,* did wrongfully abrogate the terms of said contract and deprive Petitioner Price of his property right therein, and did wrongfully appropriate Petitioners Price and Wetherall's work, labor, services and materials incorporated in the public dam and deprive Petitioners

> of their property therein of the value aforesaid without due process and did take same for public use *without just compensation in violation of the Federal Constitutional provisions* aforementioned; and NOTWITHSTANDING Respondents' further duty . . . have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioners and pay them just compensation therefor." (Emphasis supplied.)

Appellees filed a demurrer and an answer to the petition, the salient point of which was that the proceeding was a suit against the State of West Virginia and prohibited by the immunity provision of the State Constitution. No responsive pleading to a demurrer is permissible. To Appellees' answer, Appellants filed a demurrer and a reply, which again set forth the Federal grounds as follows (Record, p. 137, 146):

> "(1) Petitioners' rights are grounded on Section 1 of the Fourteenth Amendment and on the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment, and the gravamen of said petition is the violation of Petitioners' property rights protected thereby, and any application of the immunity provision of the State Constitution to the facts of this case and the protection of Petitioners' property rights is repugnant to the rights guaranteed to Petitioners by the Federal Constitution as aforesaid and would deprive Petitioners of their property without due process and constitute a taking of private property for public use without just compensation."

The trial Court issued its opinion by letter dated March 11, 1966, and entered its final order in conformity therewith sustaining Appellees' demurrer and dismissing the proceeding on the ground that it was an action against the State of West Virginia. The trial Court noted Appellants' Constitutional arguments in its opinion (Appendix D, p. 73a) stating:

> "* * * The first ground of the demurrer states that the

> petition is not sufficient in law, in that it asserts an action against the State . . . prohibited by Article VI, Section 35, of the Constitution of West Virginia. The factual situation, as shown by the petition in this case, is very similar to that in the case of *Howard Price* v. *The State Road Commission* decided by me on this date * * * the petitioners assert a property right in said contract and in the work performed and the materials furnished and contend that they may not be deprived thereof without just compensation perforce the Fifth Amendment to the Federal Constitution * * * *the constitutional question raised by the first ground of the respondents' demurrer is discussed by me in the decision in the Howard Price case, of this date,* and for the reasons therein stated, the demurrer will be sustained upon this ground * * * an order dismissing the petition * * * should make this letter memorandum of opinion *and the memorandum of opinion in the Price case a part of the record.*" (Emphasis added.)

The memorandum opinion in the Howard Price case, referred to in the opinion in this case and made a part of the record in this case by direction of the trial Court, states in part as follows (Appendix E, p. 78a):

> "* * * The petitioner here strongly contends and argues that Article VI, Section 35, of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner."

The Appellants' objections to the Court's ruling and their reasons therefor were noted in the final order itself (Appendix F, p. 86a). The reasons embracing Federal grounds read as follows:

> "1. The application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to Section 1 of the Fourteenth

Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives petitioners of their property without due process of law, and constitutes the taking of private property for public use without compensation."

"2. The State has consented to suit against Respondents by its participation of the highway project in the Federal Highway Program, and the application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I, of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce."

Appellants continued to raise the Federal questions in the Assignment of Errors in each of their petitions for writ of error (Record, pp. 18, 19, 32, 33,) to the Supreme Court of West Virginia, the pertinent parts of which read almost verbatim the objections set forth in the final order as above.

The objections and assignment of errors were denied by The Circuit Court of Kanawha County and The Supreme Court of Appeals of West Virginia. respectively.

STATEMENT OF THE CASE

Appellants' petition in the trial Court alleges (Appendix J, p. 95a) the previous proceeding, the appeal thereof to this Court, the representations therein made by Appellees that mandamus was the proper remedy, and the action of this Court in dismissing the appeal in the light of such representations, all of which is more fully set forth in the opening paragraphs of this Judicial Statement.

The petition further alleges that Appellees have the constitutional duty not to deprive any person of property without due process of law or to take property for public use

without compensation, and in the premises of such constitutional duties, upon the appropriation of private property for public use, the further duty to institute eminent domain proceedings to legally acquire it and pay for it. (Appendix J, p. 98a).

The petition further alleges that Appellant Paul Price entered into a highway construction contract with the Road Commission for the construction of a Federal Aid secondary road project. The contract included highway construction for the State Road Commission itself on its right-of-way, and the construction of a slack water dam on an adjoining recreational area owned by the State Conservation Commission, which pursuant to statute (Appendix I) it undertook through the office and facilities of the Road Commission (Appendix J, p. 99a). The roadway work and the dam work each had separate specifications (Appendix J, p. 99a). There is set forth the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work and issue requisitions for the payment thereof (Appendix J, p. 98a).

There is set forth pertinent contract provisions that the Appellant Paul Price was to be paid by monthly estimate the unit bid price for the actual quantities necessary to complete the work (Appendix J, p. 105a). The pertinent item of work involved in the action is Item 3 "Borrow Pit Excavation" under the dam portion of the work (Appendix 102a). The bid proposal, plans and special provisions ("Technical Specifications, Castleman Run Lake No. 1"), all being part of the contract documents, provided that the material required under "Borrow Pit Excavation" to be used in the dam construction *was to be taken and selected from the material removed in the roadway excavation, and the cost of selecting, segregating, hauling, placing and compacting said materials, according to the technical specifications of the Conservation Commission,* (in short, the building of the dam), *was required to be included in the unit bid*

price for Item 3, "Borrow Pit Excavation," and to be paid for under such item (Appendix J, p. 102a; *Appendix K*, p. 112a).

Appellant R. C. Wetherall had an employment contract with Appellant Paul Price to perform the actual work on the project for 90% of the unit bid price, less the costs thereof and he was to be paid for the same items and quantities of work for which Appellant Paul Price was to receive payment from the State Road Commission (Appendix J, 104a). *The work was performed and has been approved and accepted by the State Road Commission* (Appendix J, p. 105a). Appellants used 41,695.5 cubic yards of material in the dam, which was designated Item 3, "Borrow Pit Excavation." at a unit bid price of 50 cents a cubic yard. During the progress of the work the Road Commission paid Appellants monthly estimates for the estimated quantities of borrow excavation used in the dam (Appendix J, p. 105a). Upon the completion of the work the Road Commissioner calculated the final estimate of quantities and allowed for payment the 41,695.5 cubic yards of "Borrow Pit Excavation." (Appendix J, p. 105a). Subsequently, the Road Commissioner on his own accord arbitrarily eliminated from the final estimate, payment of the $20,847.75 for the 41,695.5 yards of "Borrow Pit Excavation" representing the payment for building the dam (Appendix J, p. 106a). He then deducted the amounts previously paid for "Borrow Pit Excavation" on the dam work, from the amounts still acknowledgedly due Appellants on items of road work. (Appendix J, p. 106a), and by so doing, *appropriated Appelants' materials, work, labor and services as incorporated in the dam, and which if not paid for as "Borrow Pit Excavation", Appellants will receive nothing for building the the dam.* The stated reason for the Road Commission's action was the *supposed ground that under the Standard Specifications borrow material cannot come from a right-of-way* (Appendix J, p. 107a; Appendix K, p. 113a, 114a), *notwithstanding the express directions and provisions of*

the bid instructions, bid proposal and special provisions to the contrary, all of which *governed and took precedence* over the *Standard Specifications* by an express provision of the *Standard Specifications* themselves (Appendix J, p. 103a; Appendix K, p. 114a.) (See all of Appendix K for pertinent contract provisions verbatim. *At the time this was done, the Road Commission had already requisitioned and had transferred to it by the Conservation Commission the sum of $52,200, which included the amount of $20,847.75 for building the dam under the item "Borrow Pit Excavation which was to be paid to Appellants.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The decision of the trial Court refuses to follow the decision of this Court by permitting Appellees to repudiate the representations made to and relied upon by this Court on the previous appeal, 382 U.S. 45 (1965).

2. The appeal to this Court in the previous declaratory judgment proceeding was on the same Federal questions arising from the application of the immunity provision of the State Constitution. Appellees, through the State Attorney General, represented in their motion to dismiss that Appellants proper and still available remedy was mandamus to compel eminent domain proceedings. This Court dismissed such appeal in the light of such representation. By demurrer to this mandamus proceeding, Appellees repudiated their representations to this Court, and again asserted the State Constitutional immunity provision. The trial Court held that the Appellees' representations and this Court's dismissal expressly in the light thereof did not become the law of the case, and that Appellees were not estopped by the record to again assert immunity. This holding is contrary in principle to the decisions of this Court in *Cowley* v. *Northern P. R. Co.*, 159 U.S. 569; *Fisher* v. *Shropshire*, 147 U.S. 133; *Davis* v. *Wakelee*, 156 U.S. 680; *Fletcher*

v. Peck, 6 Cranch 87, 137; *The New Philadelphia (Camden & A. R. Transport Co. v. Brady)*, 1 Black 62.

3. The importance of these questions is of grave and immediate concern to al highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commission through the Road Commissioner, who undertakes it through contracts with private concerns. The Road Commissioner, by law, is vested with extensive powers. With the expanding program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. In the fiscal year 1965-66, the Road Commissioner spent *36.28% of all funds spent by the State of West Virginia* (Official West Virginia Blue Book, 1966, p. 920) being the largest expenditure by the State for any one function. *If the Road Commissioner, under the facts of the case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are far-reaching.* The trial Court's decision would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being. It allows the state's immunity to become an instrument of favoritism, a tool of oppression, and a cloak for incompetence.

4. These questions are equally important to the citizens of this State who by State Constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly, it is important to the Federal government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* 90% of the

cost of the Interstate project here involved was paid for by the Federal government. The Road Commission is utilized by the Federal government as its agent in the exercise of its Constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of Federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

If the Road Commission and the Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors, so that the contractors are unable to secure an impartial adjudication of their rights under their contracts and the protection of their property, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis, this poses a wasteful drain upon the funds provided for the purpose by both State and Federal governments. (The trial Court noted its personal opinion in the companion appeal of *Howard Price* v. *The State Road Commission* (Appendix E, p. 82a) that the "doctrine of *immunity . . . as stated in our Constitution is archaic* and completely out of step with the times, when we observe the government, state and federal, engaging in big business").

5. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both State action within the meaning of the Fourteenth Amendment, *Shelley v. Kraemer, McGhee* v. *Sipes*, 334 U.S. 1. Appellants' work, material, and services already performed and incorporated into the public dam on the public recreational area adjoining the highway, and their rights under the contract are "property" within the protection of the due process and

equal protection of law provisions of the Fourteenth Amendment (*Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *West* v. *Chesapeake and Potomac Tel. Co.*, 295 U.S. 662; *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312; *U. S.* v. *GMC*, 323 U.S. 373; *U. S.* v. *Pewee Coal Co.*, 341 U. S. 114. The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the State by the privileges and immunities clause of the Fourteenth Amendment. *West* v. *C. & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

6. This is a suit against the State Road Commissioner for wrongfully exceeding his authority in appropriating Appellants' property under color of office, and for failing to perform his Constitutional duty to legally acquire it through eminent domain proceedings. In this respect, the holding of the lower Court in refusing mandamus is in conflict with the decisions of this Court in *Rolston* v. *Crittenden*, 120 U.S. 390; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82; *Board of Liquidation* v. *McComb*, 92 U.S. 531; and *Noble* v. *Union River Logging Company*, 147 U.S. 165; and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

7. *Mahone* v. *State Road Commission*, 99 W.Va. 397, 129 S.E. 320, decided in 1925 by the State Supreme Court, held that the statute authorizing the Road Commission as a body corporate, to be sued, violated the State Constitutional prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W.Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was *absolute* and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957, the Legislature nevertheless did not delete the consent

to be sued, *but on its reenactment reaffirmed its position that the Road Commission could sue and be sued.* These judicial holdings *impose a stringency in excess of the common law doctrine of immunity.* Under such holdings, it is impossible to give consent, although in fact *the Legislature has consented to suits against the Road Commission.* Such holdings, as against the assertion of a Federal right, constitutional or statutory, are in conflict with the decision of this court in *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184. It is likewise in conflict with *Lawrence* v. *State Tax Commission*, 286 U.S. 276, for the Federal Constitutional guarantee of due process likewise insures the privilege to have that right judicially declared and protected.

8. The trial Court in ruling on Appellees' *demurrer*, took the position that by virtue of the decisions of the State Supreme Court, this mandamus proceeding was subject to the same infirmity as the previous declaratory judgment proceeding and was an action against the State. The trial Court's ruling in this respect, without the taking of evidence on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is in conflict with this Court's decision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; and *Tindal* v. *Wesley*, 167 U.S. 204.

9. The money for the payment of the dam construction was *expressly appropriated* by the state Legislature *for such purpose.* It had been *separated and segregated* from the general revenues, and *actually transferred* by the State Conservation Commission to the State Road Commission *for payment to the Appellants* for the dam construction. Inherent in the trial Court's opinion was its opinion in the previous declaratory judgment proceeding, that the proceeding was against the State in view of the fact that to compel the Road Commissioner to perform his duty to institute eminent domain proceedings would set in motion a

sequence of events which would ultimately result in the payment of this money. This holding is contrary in principle to the decision of this Court in *Houstin* v. *Ormes*, 252 U.S. 469.

10. On demurrer, the allegations of Appellants' petition must be assumed to be true, *Ickes* v. *Fox*, 300 U.S. 82, 96. The facts alleged are that the Road Commissioner, by refusing to institute eminent domain proceedings, has appropriated $20,847.75 of Appellants' property as incorporated in the public dam in a public recreational area without compensation to Appellants, and for which the Road Commissioner has collected the payment therefor from the State Conservation Commission, and kept to the use of the Road Commission contrary to the purpose for which it was appropriated by the State Legislature. *Appellants have been deprived of their property for public use, denied their compensation therefor, and refused the opportunity to establish their rights. Appellants have not had their day in Court, they have not had the due process of law.*

CONCLUSION

The questions presented on this appeal are of public importance, affecting the State and Federal highway construction program and the highway construction industry. They comprehend the required extent of governmental morality, the accountability of State officials, and the necessary balance between the prerogative of governmental authority and the Constitutional rights of the individual. Appellants submit that the precedents established by this Court do not support the decision of the Circuit Court of Kanawha County, but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

April 25, 1967

Respectfully submitted,

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No. 428

In The

Supreme Court of the United States

October Term, 1965

R. C. Wetherall, Jr. and Paul Price

Appellants

v.

The State Road Commission of West Virginia, a Corporation, and Burl A. Sawyers, as State Road Commissioner,

Appellees

On Appeal from the Circuit Court of Kanawha County, West Virginia

JURISDICTIONAL STATEMENT

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No. ——

IN THE

Supreme Court of the United States

October Term, 1965

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Circuit Court of Kanawha County, West Virginia, entered on May 21, 1964, dismissing appellants' complaint and cross-claim on the ground it constituted a suit against the State of West Virginia. On petition timely filed the Supreme Court of Appeals of West Virginia, by order dated March 15, 1965, refused to review the judgment and returned the record to the Circuit Court of Kanawha County. The time for re-petitioning has expired. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

This appeal presents another and complementary aspect of the denial of due process in the handling of State Road Commission highway construction contracts as contained in

Appeal No. 144, October Term, 1965, now pending in this Court and styled Howard Price d/b/a Howard Price and Company v. The State Road Commission of West Virginia, a corporation, et als. Both cases involve the taking by the State of a contractor's work and material as incorporated in public projects and denying him a day in court to establish and enforce his rights.

OPINION BELOW

The letter opinion of the Circuit Court of Kanawha County, West Virginia, dated April 13, 1964, is not reported. Copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Appellant R. C. Wetherall, Jr. filed his declaratory judgment complaint in the Circuit Court of Kanawha County on September 24, 1963, pursuant to Chapter 26, Acts of the West Virginia Legislature, Regular Session 1941, page 132, (Appendix B) being Chapter 55, Article 12, Code of West Virginia, 1931, as amended, and Rule 57 of the West Virginia Rules of Civil Procedure, 144 W. Va. Reports, page xxviii, (Appendix C). The complaint sought a declaratory judgment as to the rights of Appellant R. C. Wetherall, Jr. and of the Appellant Paul Price under a highway construction contract entered into by Appellant Paul Price with the State Road Commission of West Virginia, asking: (1) That a certain provision of the contract be interpreted and the rights of the parties declared; and sequentially (2) that after such interpretation and declaration of rights, the Road Commission be compelled to perform his statutory duty to audit Appellants' claim for work performed in constructing a small dam.

On May 21, 1964, the trial Court entered its final judgment order sustaining Appellees' motion to dismiss Appellants' complaint and cross-claim as a suit against the State. This is the judgment upon which review is sought (Appendix D).

Appellants thereupon filed their petition for appeal to the Supreme Court of West Virginia on January 6, 1965. On March 15, 1965 the Supreme Court of Appeals of West Virginia entered its order refusing to review the case (Appendix J). The time for re-petitioning had expired and the record was returned to the Circuit Court of Kanawha County.

Notice of appeal to the Supreme Court of the United States was filed with the Circuit Court of Kanawha County, West Virginia, on June 11, 1965.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by title 28, United States Code, Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment of the Federal Constitution on the facts of the case, is within the purview of that section. *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall 661; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U.S.* v. *County of Allegheny*, 322 U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginian R. Co.* v. *Mullens*, 271 U.S. 220.

The cause presents a justiciable controversy and meets the conditions which establish the validity of the declaratory procedure as set forth in *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U.S. 249 and *Evers* v. *Dwyer*, 358 U.S. 202.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Roberts* v. *Cottingham*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P.*

Tel. Co., 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISION INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted to voters; Ratified 1936. (The amendment added an exception pertaining to garnishment):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1966 Supplement thereto conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES.—The State Road Commission of West Virginia, heretofore cre-

ated and *existing as a corporation*, shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1445 (1)), p. 866.) (Italics supplied.)

• • • •

2. The following statutes are also pertinent as pertaining to the Road Commissioner's duty to audit contractor's claims and issue requisitions for their payment; the statutory direction that road construction shall be performed under contract awarded by bid, giving detailed statutory requirements; and the statutory authority for the State Conservation Commission to undertake the construction of slack water dams through the office and facilities of the State Road Commission.

Chapter 17, Code of West Virginia, 1931, as amended:

Article 3, Section 4

Article 4, Sections 19, 20 and 21

Chapter 20, Code of West Virginia, 1931, as amended:

Article 5, Part II, Sections 6, 7, 8, 9, 10

(See Appendix E for pertinent parts of above sections, and official reference to amending Acts of the Legislature).

QUESTIONS PRESENTED

Appellants R. C. Wetherall and Paul Price, by a declaratory judgment complaint and cross-claim respectively, against the Road Commission and the Road Commissioner, asked for an interpretation of a highway and dam construc-

tion contract between Appellant Paul Price and the Road Commission.

The contract with the Road Commission included the construction of a slack water dam for the State Conservation Commission which was to pay the cost of same. The dam work was to be, and was, paid for during the progress of the dam work in the monthly estimates. When the dam work was completed and accepted, the Road Commissioner arbitrarily ignored the terms of the contract and deducted the payments already made for the dam work from the payment still acknowledgedly due on road construction. The Road Commission had already collected from the State Conservation Commission the payment for the dam work which it withholds from Appellant Paul Price. There is no dispute of fact as to the work involved. The dispute is solely one of law upon the interpretation of the contract. As permitted by the West Virginia Rules of Civil Procedure, the complaint and cross-claim asks that after the rights were declared, that Appellants be granted coercive relief compelling the Road Commissioner to perform his statutory duty to audit the claim, certify the dam work, and issue a requisition for its payment. On motion to dismiss the Court declined to interpret the contract on the ground the proceeding was against the State of West Virginia and prohibited by Section 35, Article VI of the State Constitution. The questions presented are:

1. Were the actions of the Road Commissioner, as alleged, and the action of the trial Court in applying the immunity provision of the State Constitution, refusing to interpret the contract and dismissing the proceeding, repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

(1) Constitute a denial of due process of law by the State?

(2) Constitute the taking by the State of private property for public use without just compensation?

(3) Constitute a denial by the State of the equal protection of the law?

2. Does the application by the State Court to Appellants' complaint and cross-claim, of said Section 35, Article VI of the Constitution of West Virginia, on the Appellees' motion to dismiss, and without a hearing on the merits or an interpretation of the contract, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Appellees filed a motion to dismiss the complaint on the ground that the proceeding was a suit against the State of West Virginia and prohibited by the immunity provision of the State Constitution. By stipulation it was agreed the motion would likewise apply to the cross-claim. It was at this initial stage that the Federal questions were raised.

The West Virginia Rules of Civil Procedure allow no responsive pleadings to a motion to dismiss, and the Federal questions were raised in argument on the motion to dismiss. Appellants argued that the application to this case of the state constitutional provision on immunity, for the work material and services already performed by Appellants and incorporated into the public dam on the public recreational area, and for which, on a legal and proper interpretation of the contract, the Road Commissioner had no right or authority to refuse to certify, and for which he had a statutory duty to audit and issue a requisition for payment, would deny Appellants the due process and equal protection of law, and allow their property to be taken by the Road Commission for public use without any compensation to them.

The trial court issued its opinion on the motion by letter dated April 13, 1964, and on May 21, 1964, entered the final judgment order (Appendix D), sustaining Appellees' mo-

tion, dismissing the entire proceeding on the ground that it was an action against the State of West Virginia.

The Appellants objections to the Court's rulings and their reasons therefor were noted in the final order itself. The reasons embracing Federal grounds read as follows:

* * *

"7. The Court's ruling denies plaintiff and defendant and cross-claimant Paul Price, the rights guaranteed to them under Section 10, Article I of the Constitution of the United States, and under Section 1, Article XIV of the Amendments to the Constitution of the United States."

* * *

Appellants further raised the federal questions in their Assignment of Errors (Record, p. 28) contained in their petition for appeal to the Supreme Court of West Virginia, the pertinent parts of which read as follows:

* * *

"16. The dismissal of the action denies the plaintiff Wetherall and cross-claimant Price the right of due process guaranteed to them under both the State and Federal constitutions.

17. The dismissal of the action denies plaintiff Wetherall and cross-claimant Price the right to receive just compensation for property taken for public use as guaranteed under both the State and Federal Constitutions."

* * *

The objections and the assignment of errors were denied by the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia respectively.

An amplified restatement of these federal questions appears in the order certifying the existence of federal questions and entered by the trial Court on June 1, 1965, (Appendix F) the pertinent parts of which read as follows:

"• • • and it hereby is certified and by this order made a part of the record of this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure no responsive pleading is permitted to a motion to dismiss; that in the arguments made in this Court on behalf of the plaintiff and on behalf of the cross-claimant, upon the motion to dismiss by the defendants, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, State Road Commissioner, it was insisted and relied upon by said plaintiff and by said cross-claimant, that the application of Section 35, Article VI of the Constitution of West Virginia, to this case would deprive plaintiff and cross-claimant of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution; and the question was not determined favorably to the plaintiff and to the cross claimant as appears from the entry and final order of dismissal made herein, to all of which counsel for the defendant objects and excepts upon the ground that said issues were not shown upon the record. • • •"

STATEMENT OF THE CASE

Appellants R. C. Wetherall's and Paul Price's complaint and cross claim respectively are attached as Appendix G and H. In essence the complaint and cross-claim allege as follows. Appellant Paul Price entered into a highway construction contract with the Road Commission for the construction of a Federal Aid secondary road project. The contract included highway construction for the State Road Commission itself on its right-of-way, and the construction of a slack water dam on an adjoining recreational area owned by the State Conservation Commission, which pursuant to statute (Appendix E) it undertook through the office and facilities of the Road Commission (Appendix G, p. 23a). The roadway work and the dam work each had separate specifications (Appendix G, p. 22a). There is set

forth the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work and issue requisitions for the payment thereof (Appendix G, p. 22a).

There is set forth pertinent contract provisions that the Appellant Paul Price was to be paid by monthly estimate the unit bid price for the actual quantities necessary to complete the work (Appendix G, p. 23a). The pertinent item of work involved in the action is Item 3 "Borrow Pit Excavation" under the dam portion of the work (Appendix G, p. 24a). The bid proposal, plans and special provisions ("Technical Specifications, Castleman Run Lake No. 1"), all being part of the contract documents, provided that the material required under "Borrow Pit Excavation" to be used in the dam construction *was to be taken and selected from the material removed in the roadway excavation, and the cost of selecting, segregating, hauling, placing and compacting said materials, according to the technical specifications of the Conservation Commission,* (in short, the building of the dam), *was required to be included in the unit bid price for Item 3, "Borrow Pit Excavation," and to be paid for under such item* (Appendix G, pp. 24a, 25a; Appendix I, p.p. 32a, 33a).

Appellant R. C. Wetherall had an employment contract with Appellant Paul Price to perform the actual work on the project for 90% of the unit bid price, less the costs thereof and he was to be paid for the same items and quantities of work for which Appellant Paul Price was to receive payment from the State Road Commission (Appendix G, p. 25a). The work was performed and has been approved and accepted by the State Road Commission (Appendix G, p. 25a). Appellants used 41,695.5 cubic yards of material in the dam, which was designated Item 3, "Borrow Pit Excavation," at a unit bid price of 50 cents a cubic yard. During the progress of the work the Road Commission paid Appellants monthly estimates for the estimated quantities

of borrow excavation used in the dam (Appendix G, pp. 25a, 26a), Upon the completion of the work the Road Commissioner calculated the final estimate of quantities and allowed for payment the 41,695.5 cubic yards of "Borrow Pit Excavation." (Appendix G, p. 26a). Subsequently, the Road Commissioner on his own accord arbitrarily eliminated from the final estimate, payment of the $20,847.75 for the 41,695.5 yards of "Borrow Pit Excavation" representing the payment for building the dam (Appendix G, p. 26a). He then deducted the amounts previously paid for "Borrow Pit Excavation" on the dam work, from the amounts still acknowledgedly due Appellants on items of road work. (Appendix G, p. 26a). The stated reason for the Road Commission's action was the *supposed ground that under the Standard Specifications borrow material cannot come from a right-of-way* (Appendix G, p. 27a; Appendix I, p. 33a, 34a). *notwithstanding the express directions and provisions of the bid instructions, bid proposal and special provisions to the contrary,* all of which *governed and took precedence* over the *Standard Specifications* by an express provision of the *Standard Specifications* themselves (Appendix G, p. 24a; Appendix I, p. 34a, 35a.) (See all of Appendix I for pertinent contract provisions verbatim) (We note the trial Court was under the erroneous impression that when the Commissioner increased the item of Unclassified Excavation, he was re-classifying the Borrow Excavation as such (Appendix A, p. 2a), when in fact the increase of Unclassified Excavation was due to slide removals, etc., which had nothing to do with the dam or Borrow Excavation).

Appellant Paul Price refused to institute this proceeding stating he had only a 10% interest therein and did not want to *"antagonize"* the Road Commission (Appendix G, p. 26a). Appellant R. C. Wetherall filed the action and made Appellant Paul Price a defendant, who filed a cross-claim against the Road Commission and Road Commissioner.

There is no factual dispute, but only a dispute of law as

to the terms of the contract and the Road Commission's obligation to pay for the construction of the dam as represented under the Item 3, designated "Borrow Pit Excavation," (Appendix G, p. 27a). and now appropriated by the State as incorporated in one of its public recreational facilities, *and which if not allowed, the Appellants will receive nothing for building the dam.*

Not known to the Appellants until after the time of the entry of the final order, *the Road Commission had already requisitioned and had transferred to it by the Conservation Commission the sum of $52,200, which included the amount for building the dam under the item "Borrow Pit Excavation" which was to be paid to Appellant Paul Price.* This fact was noted in the petition for appeal to the Supreme Court of Appeals of West Virginia and photocopies of the paid requisitions attached thereto (Record, pp. 31, 32).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented on this appeal involve the underlying question whether or not the immunity of the State under West Virginia's peculiar constitutional provision is available as a defense to the Road Commission and the Road Commissioner under the particular allegations of Appellants' complaint and the relief sought therein. Numbered paragraphs 2, 3, 4, 7 and 8 herein are substantially the same as the similarly numbered paragraphs contained in this section of the Jurisdictional Statement filed in Appeal No. 144, October, 1965 term (Howard Price dba etc., 1. State Road Commission et als) and now pending before this Court.

1. The importance of this question is of grave and immediate concern to all highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commission through the Road Commissioner, who undertakes it

through contracts with private concerns. The Road Commissioner by law is vested with extensive powers, and with the expanding highway program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. *If the Road Commissioner, under the facts of this case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are obvious and far-reaching.*

The Trial Court's decision would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being. *It allows the State's immunity to become an instrument of favoritism, a tool of oppression, a cloak for incompetence on matters supposedly dignified by the sanctity of contractual obligation.*

2. These questions are equally important to the citizens of this State who by constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly it is important to the Federal Government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* Part of the cost of the project here involved was paid for by the Federal Government. In the fiscal year 1961-62 the Road Commissioner spent approximately 30% of all funds spent by the State of West Virginia (Official West Virginia Blue Book, 1963, p. 953).

If the Road Commission and Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors so that the contractors are unable to secure an impartial adjudica-

tion of their rights under their contracts, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis this poses a wasteful drain upon funds provided for the purpose by both the State and Federal governments.

3. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both state action within the meaning of the Fourteenth Amendment (*Shelley* v. *Kraemer*, *McGhee* v. *Sipes*, 334 U.S. 1). Appellants' work, material and services already performed and incorporated into the public dam on the public recreational area adjoining the highway, and their rights under the contract are "property" with the protection of the due process and equal protection of law provision of the Fourteenth Amendment (*Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the states by the privileges and immunities clause of the Fourteenth Amendment (*West* v. *C & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

4. This is a suit against the State Road Commissioner for wrongfully exceeding his authority, under color of office, and for failing to perform a statutory duty. The contract being with the Road Commission it was a necessary party to a declaration of the rights thereunder. The mere declaration of such rights does not constitute a suit against the State. *Once these rights are judicially determined by an interpretation of the contract, it will be shown that the Road Commissioner failed to perform his statutory duty.* Under the prayer for coercive relief, as permitted in West

Virginia declaratory judgment procedure to be joined with the prayer for declaratory relief, the complaint sequentially asks that the Road Commissioner be compelled to perform his statutory duty. In this respect the holding of the lower court is in conflict with the decisions of this Court in *Rolston* v. *Crittenden*, 120 U.S. 390, *Payne* v. *Central P. R. Co.*, 255 U.S. 228, *Ickes* v. *Fox*, 300 U.S. 82, *Board of Liquidation* v. *McComb*, 92 U.S. 531, and *Noble* v. *Union River Logging Company*, 147 U.S. 165, and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

5. *Mahone* v. *State Road Commission*, 99 W. Va. 397, 129 S.E. 320 decided in 1925 by the State Supreme Court, held that the statute authorizing the Road Commission to be sued was unconstitutional as violating the prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was absolute and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957 the Legislature nevertheless did not delete the consent to be sued, but on its reenactment reaffirmed its position that the Road Commission could sue and be sued, and thereby provided a legislative recognition of the requirements of due process.

The trial Court took the position that by virtue of the decisions of the State Supreme Court, the action as a declaratory judgment proceeding was per se an action against the State. By taking such position the trial Court *avoided making an interpretation of the contract which was solely a matter of law.* It undertook then to consider it as a mandamus and held that the cause was a *"claim involving a legitimate dispute as to the interpretation and application" of the contract*, and that the Road Commissioner's construction was not *"arbitrary or unreasonable"*, a holding which *necessarily postulates that the interpretation of the contract*

was within the discretion of the Road Commissioner, and in effect destroys the sanctity of the Commission's contractual obligation. The trial Court's ruling in this respect, without interpreting the contract on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is i nconflict with this Court's decision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196, and *Tindal* v. *Wesley*, 167 U.S. 204. Only after the preliminary question as to the rights of the parties under the contract had been decided, and the same decided against the Appellants can there come into play any claim of sovereign immunity. We note that in Appeal No. 144, October Term 1965 (Howard Price dba etc. v. State Road Commission et als) the trial Court in applying the constitutional provision dismissed the action because it involved *a controversy of fact;* in the case herewith it dismissed it when the sole matter involved was a *question of law.*

6. Inherent in the opinion of the lower Court was the thought that the proceeding was against the State in view of the fact that to compel the Road Commissioner to perform his statutory duties would set in motion a sequence of events which would ultimately result in the payment of money. This holding is contrary in principle to the decision of this Court in *Houston* v. *Ormes*, 252 U.S. 469.

The money for the payment of the dam construction was expressly appropriated by the State Legislature for such purpose. It had been separated and segregated from the general revenues, and actually transferred by the State Conservation Commission to the State Road Commission for payment to the Appellants for the dam construction. *The statutes expressly gives to the Road Commission the legislative authority to enter into construction contracts, and as part of that authority attached the condition it may be sued.* The statute also makes it mandatory for the Road Commissioner to audit the contractor's claims and issue his requisition for the payment of those found correct.

7. The Federal Government by furnishing participating funds for certain projects, the contracts for the construction of which are handled by the Road Commission, has utilized the Road Commission as its agent in the exercise of its constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

8. The State Supreme Court by its prior decisions holding the Legislature can never consent to a suit, imposed a stringency in excess of the common law doctrine of immunity. Under such holdings it is impossible to give consent, although in fact the Legislature has consented to suits against the Road Commission. Whether such absolute immunity, in the light of the Legislature's granting such consent, is valid, regardless of whether the proceedings concern property taken for public use without compensation, is a question never passed on by this Court.

9. On motion to dismiss, the allegations of Appellants' Complaint and cross-claim must be assumed to be true. The facts alleged are that the Road Commissioner, by refusing to certify Appellants' work in constructing the dam, has appropriated $20,847.75 of Appellants' property as incorporated in the public dam in a public recreational area without compensation to Appellants, and for which the Road Commissioner has collected the payment therefor from the State Conservation Commission, and kept to the use of the Road Commission contrary to the purpose for which it was appropriated by the State Legislature. *Appellant has been deprived of his property for public use, denied his compensation therefor, and refused the opportunity to establish his rights by a simple question of law on the interpretation of the contract. Appellant has not had his day in Court, he has not had the due process of law.*

CONCLUSION

The questions presented on this appeal are of public importance, effecting both the State and Federal highway construction program, the highway construction industry and the board spectrum of governmental morality. They involve the accountability of state officials and the delicate balance between the prerogative of governmental authority and the constitutional rights of the individual. Appellant submits that the precedents established by this Court do not support the decision of the Circuit Court of Kanawha County but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

August 3, 1965

Respectfully submitted,

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CHARLES W. YEAGER
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APPENDIX A

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

Frank L. Taylor
Judge

April 13, 1964

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Gentlemen:

Re *R. C. Wetherall, Jr.* v. *State Road Commission, et al*

This cause now comes on upon the motions of the defendants, The State Road Commission of West Virginia, and Burl A. Sawyers, State Road Commissioner, to dismiss the complaint of the plaintiff, R. C. Wetherall, Jr., and the cross-claim asserted against the State Road Commission by the defendant Paul Price.

The complaint declares that "This action is brought pursuant to the West Virginia Uniform Declaratory Judgment Act, * * *." The anomalous relief prayed for by the plaintiff is that this Court "* * * declare the right of Paul

Price to be paid by the Road Commission * * *" certain specified sums of money. In addition, coercive relief is sought by the plaintiff.

The source of this action is the construction contract awarded to Paul Price by the State Road Commission, dated October 28, 1960, for the construction of a roadway, dam and causeway, known as the Castleman Run Road Project. The plaintiff's involvement arises out of an employment agreement between the plaintiff and Paul Price dated November 29, 1960, whereby the plaintiff agreed to perform the actual work involved in the project for a specified percentage of the unit bid prices paid by the Road Commission. Privity of contract is not alleged to exist between the plaintiff and the Road Commission.

Upon completion of the construction work, the State Road Commissioner calculated the total estimate of quantities of work performed and classified the excavation into the various categories for the purpose of awarding the proper compensation to Paul Price. In response to a protest by Paul Price, 41,695.5 cubic yards of excavation, which had been designated "borrow pit excavation" at a unit bid price of fifty cents per cubic yard, was re-classified by the Commissioner as "unclassified excavation", having a unit bid price of sixty cents per cubic yard. Paragraph eleven of the complaint states:

> "That no dispute exists between any of the parties hereto as to the work performed on the items designated as unclassified excavation and borrow, nor any dispute as to the quantities of said work, but only a dispute as to whether under the terms of the contract the Road Commission is obligated to pay for the borrow."

In other words, the issue presented is whether or not, under the terms of the construction contract, the contractor is entitled to compensation at the rate of fifty cents per cubic yard for excavating 41,695.5 cubic yards from the

roadway, and an additional sixty cents per cubic yard for placing the same 41,695.5 cubic yards of excavation in the causeway embankment.

However, it is manifest, even before resorting to a consideration of the terms of the construction contract, that the motion to dismiss the plaintiff's complaint must be sustained. It is apparent from the allegations of the complaint that the plaintiff does not allege a cause of action against the Road Commission, because, as heretofore noted, the only alleged relationship between the plaintiff and the Road Commission was the employment agreement between the plaintiff and Price whereby the plaintiff agreed to perform the actual work on the project for a percentage of the compensation. The allegation to the effect that the plaintiff will ultimately derive the greatest benefit in the event of recovery from the Road Commission, is not a sufficient interest to make the plaintiff the real party in interest. *39 Am. Jur., Parties,* §17, page 871, et seq.

It is declared in the complaint, and argued in plaintiff's brief, that Rule 17(a), R.C.P. gives the plaintiff the right to institute this proceeding against the Road Commission. It is, however, my interpretation that the "real party in interest" provision of Rule 17 was not intended to give a person who is a stranger to a contract, authority to assert the rights of one of the parties merely because the stranger may ultimately derive what is alleged to be the greatest benefit therefrom, as is the case here. "Most authorities agree that the 'real party in interest' is the party who, by the substantive law, possessed the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *3 Federal Practice and Procedure, Barron and Holtzoff,* §482, page 7, et seq. I am therefore of opinion to sustain the motion to dismiss the complaint of the plaintiff R. C. Wetherall, Jr.

The cross-claim of the defendant, Paul Price, affirms and adopts all of the allegations of the plaintiff's complaint with

the exception of paragraph ten. The cross-claim does not declare the theory upon which the claim is based, but the relief prayed for is for this Court to declare his right to be paid certain sums of money by the State for the work involved in the construction project, and that the Road Commissioner be compelled to issue a requisition upon the State Auditor for payment for such work. As alleged in paragraph one, this claim is predicated upon the authority of Code, 17-3-4, which provides in part:

> "Any claim of a contractor or others, not otherwise provided for, for labor done or for materials and supplies furnished *to the state road commission*, pursuant to the provisions of any article of this chapter, shall be audited by the commission, and, if found to be correct, the commission shall issue its requisition upon the auditor of the State therefor, showing the nature of such claim and whether it is for labor done or materials and supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the treasury provided for that purpose." (Emphasis supplied.)

It must be kept in mind that the uniqueness of the remedy employed in seeking to enforce the relief provided for in the above statute, without commenting on the propriety thereof, does not serve to elude the stringent prerequisites heretofore prescribed to the award of a writ of mandamus. In *State* v. *Road Commission*, 108 W.Va. 41, the relators sought mandamus to compel the State Road Commission to execute a requisition upon the State Auditor for work performed in the construction of a roadway. In order to comply with certain technical specifications in the contract, it became necessary for the relators to excavate beneath the designated crown of the road being constructed, and "back fill" with material suitable for the purpose. There were no provisions in the contract entitling the relators to com-

pensation for the additional work. The assistant division engineer recommended to the Commission that the relators should be paid for the additional work, but the Commission refused to issue a requisition upon the State Auditor. The Court, in refusing the writ, held that the additional work performed was actually incident to the work for which the estimates were made and compensation paid by the State Road Commission. The Court then went on to say:

> "'Since the purpose of a writ of mandamus is not to establish a legal right but to enforce one which has already been established, the legal right of plaintiff or realtor to the performance of the particular act of which performance is sought must be clear and complete.' 38 C.J.S. 582. A doubtful or substantially disputed right will not be enforced by mandamus. Idem, page 585. The writ is never issued in a doubtful case. 'Clear legal right of the relator in mandamus to have performance of the act he seeks to coerce performance of, and plain duty to perform it, on the part of the respondent, are essential to the award of the writ.' Smith v. County Court, 78 W.Va. 168. Under these well settled principles the writ could in no event be awarded in the instant case. The most liberal concessions to the relators would involve a question of doubt."

Judge Maxwell, commenting on the decision in *Draper* v. *Anderson*, 102 W.Va. 633, awarding mandamus, made the following observations:

> "Clearly, the 'labor performed by them * * * under a contract' there referred to, is labor for which the contractors are to be paid under the terms of the contract, —not labor as to which there may be a legal question as to whether the contract contemplates compensation to the contractors. The *Draper* case only went to the extent of holding, as declared in syllabus one, that 'The performance by public officials of a plain legal duty, not involving the exercise of discretion or judgment on their part, may be enforced by writ of mandamus.' The

converse is necessarily true. Where there is not a plain statutory duty to be performed mandamus will not lie."

The fundamental rule that one who seeks to enforce mandamus must show clear legal right to the remedy, and the plain duty of the respondent to perform the act, has consistently been resounded and applied in numerous decisions by the Supreme Court of Appeals of this State. *Hutton* v. *Holt*, 52 W. Va. 672; *Marcum* v. *Ballot Commissioners*, 42 W. Va. 263; *State ex rel. Smith* v. *County Court*, 78 W. Va. 168; *Koebert* v. *Clarksburg*, 114 W. Va. 406; and *State ex rel. Fox* v. *Board of Trustees*, The Syllabus Service, Supreme Court of Appeals of West Virginia, March 17, 1964.

It is apparent from the allegations of the cross-claim and exhibits attached thereto (Contractor's Proposal, Contract, Standard Specifications and Technical Specifications) not only that this cause is, at best, a claim involving a legitimate dispute as to the interpretation and application of various provisions of the Contract and Specifications relative to the work done, but that the position taken by the defendants, in construing and applying the contract, is not arbitrary or unreasonable. The cross-claimant having failed to demonstrate his clear legal right, and the plain duty of the defendants, it therefore appearing to a certainty that the cross-claimant is not entitled to relief under Code, 17-3-4 under any state or facts which could be proved in support of the cross-claim, I am of opinion to sustain the motion of the defendants, The State Road Commission and Burl A. Sawyers, State Road Commissioner, to dismiss the cross-claim.

A proper order in conformity herewith should be tendered for entry promptly, and should make this letter memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary.

Very truly yours,

FLT:R

FRANK L. TAYLOR, *Judge*

APPENDIX B

Chapter 26, Acts of the West Virginia Legislature, Regular Session, 1941, p. 132, entitled "Uniform Declaratory Judgments Act", being Chapter 55, Article 13 of the Code of West Virginia, 1931, as Amended; Same, Michie's Code of 1961 (Serial Sections 5516(1) to (16) p. 1131)

Section 1. POWERS OF COURTS TO DECLARE RIGHTS, STATUS AND OTHER LEGAL RELATIONS. —Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Section 2. WHO MAY HAVE DETERMINATION AND OBTAIN DECLARATION.—Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 3. CONSTRUCTION OF CONTRACT BEFORE OR AFTER BREACH.—A contract may be construed either before or after there has been a breach thereof.

Section 4. DECLARATION CONCERNING TRUSTS AND ESTATES.

* * *

Section 5. ENUMERATION NOT RESTRICTION.—The enumeration in sections two, three, and four does not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory

relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Section 6. WHEN COURT MAY REFUSE JUDGMENT OR DECREE. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Section 7. REVIEW OF ORDERS, JUDGMENTS AND DECREES.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees.

Section 8. FURTHER RELIEF ON PETITION; SHOWING BY ADVERSE PARTY.—*Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.* The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith (Italics supplied).

Section 9. ISSUES OF FACT; TRIAL AND DETERMINATION.—*When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.* (Italics supplied).

Section 10. AWARD OF COSTS.

* * *

Section 11. PARTIES TO ACTION; MUNICIPAL ORDINANCE OR FRANCHISE INVOLVED.

* * *

Section 12. ARTICLE REMEDIAL; LIBERAL CONSTRUCTION AND ADMINISTRATION. This article is

declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Section 13. "PERSON" DEFINED.

* * *

Section 14. PROVISIONS SEVERABLE; EXCEPTIONS.

* * *

Section 15. INTERPRETATION AND CONSTRUCTION.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Section 16. CITATION OF ARTICLE.—This article may be cited as the "Uniform Declaratory Judgments Act."

APPENDIX C

WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD

Adopted and promulgated by order of the Supreme Court of Appeals of West Virginia entered October 13, 1959, effective on and after July 1, 1960, and as contained in 144 W. Va. Reports, p. xcviii.

• • •

RULE 57
DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgment Act, Code, Chapter 55, Article 13, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. *The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action* or upon petition to any court in which the declaratory action might have been instituted. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (Italics supplied).

• • •

APPENDIX D

R. C. Wetherall, Jr.,

v.

Civil Action No. 3921

The State Road Commission of West Virginia, a corporation, Burl A. Sawyers, as State Road Commissioner, and Paul Price,

On a day heretofore, this action came on to be heard upon:

(a) Plaintiff's complaint and exhibits thereto;

(b) The motion to dismiss the action and complaint on behalf of the defendants, The State Road Commission and Burl A. Sawyers as State Road Commissioner, on the ground the complaint fails to state a cause of action against them over which the Court has jurisdiction;

(c) The answer of the defendant Paul Price;

(d) The amended answer of the defendant Paul Price and his cross-claim against the defendants The State Road Commission and Burl A. Sawyers as State Road Commissioner;

(e) The stipulation that the motion to dismiss the action and complaint on behalf of the defendants, The State Road Commission and Burl A. Sawyers as State Road Commissioner, shall also be taken and treated as a motion to dismiss the cross-claim of the defendant and cross-claimant Paul Price;

and upon all the orders filed herein and upon the briefs and argument of counsel.

Whereupon the Court took time to consider its decision and after deliberation is of the opinion to, and doth hereby, SUSTAIN the motion of the defendants The State Road

Commission and Burl A. Sawyers as State Road Commissioner, (1) to dismiss plaintiff's complaint on the ground the plaintiff does not allege a cause of action against the defendants the State Road Commission and Burl A. Sawyers as State Road Commissioner; and (2) to dismiss the cross-claim of the defendant and cross-claimant Paul Price on the ground that cross-claimant has failed to demonstrate a clear legal right and is not entitled to relief under Chapter 17, Article 3, Section 4 of the Official Code of West Virginia, 1931, as amended, all for the reasons expressed in a letter memorandum of opinion of the Court dated April 13, 1964, which letter memorandum of opinion is ORDERED to be, and is hereby, filed herein as a part of this order and made a part of the record of this cause.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. Plaintiff's complaint be, and it is hereby, dismissed with prejudice; and

2. The cross-claim of the defendant and cross-claimant Paul Price be, and it is hereby, dismissed with prejudice.

3. The defendants, The State Road Commission and Burl A. Sawyers as State Road Commissioner, be, and they are hereby, awarded judgment against the plaintiff and the cross claimant, Paul Price, for their costs in their own behalf expended and a statutory attorney fee of ten dollars.

To all of which action of the Court the plaintiff R. C. Wetherall, Jr., and the defendant and cross-claimant Paul Price, do object and except for the following reasons:

1. The complaint and exhibits show that R. C. Wetherall, Jr. is the real party of interest, that Paul Price had refused to prosecute the claim and had been made a party defendant herein pursuant to Rule 19(a) of the Rules of Civil Procedure; and that R. C. Wetherall, Jr. is accordingly a proper party plaintiff.

2. The interpretation of the contract by the Court on a motion attacking jurisdiction, is premature.

3. *The interpretation of the contract is a matter of law and not subject to the discretion of the defendants,* and the test of clear legal right as comprehended in mandamus is not applicable. (Italics supplied.)

4. The ruling of the Court is contrary to the law and the pleadings.

5. The ruling of the Court is contrary to the contract evidenced by the exhibits to the complaint.

6. The Court's ruling denies plaintiff and defendant and cross-claimant Paul Price the rights guaranteed to them under Sections 9, 10 and 17, Article III of the Constitution of West Virginia.

7. *The Court's ruling denies plaintiff and defendant and cross-claimant Paul Price, the rights guaranteed to them* under Section 10, Article I of the Constitution of the United States, and *under Section 1, Article XIV of the Amendments to the Constitution of the United States.* (Italics supplied.)

8. Plaintiff's action and defendant and cross-claimant Paul Price's cross-claim, are not suits against the State of West Virginia within the prohibition of Section 35, Article VI of the Constitution of West Virginia, nor proceedings in mandamus, *but are an action and cross-claim to declare plaintiff's and cross-claimant's rights and compel the performance of a statutory duty by the defendant Burl A. Sawyers as State Road Commissioner.* (Italics supplied.)

9. Such other reasons as may be later assigned by plaintiff and cross-claimant on an appeal.

May 21, 1964

ENTER

FRANK L. TAYLOR
Judge

APPROVED AS TO FORM:

ANTHONY G. HALKIAS,
Attorney for Defendants
The State Road Commission
and Burl A. Sawyers as
State Road Commissioner

JAMES W. ST.CLAIR,
Attorney for the defendant
and cross-claimant, Paul Price

CARNEY M. LAYNE,
Attorney for plaintiff,
R. C. Wetherall, Jr.

APPENDIX E

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor or others*, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission*, pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the commission's requisition upon the auditor of the State therefor*, showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia 1961, 1964 Cumulative Supplement, (Serial Section 1452), p. 171.) (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR. —*All work of construction * * * of state roads * * *, and the furnishing of all materials and supplies therefor * * * shall be done and furnished pursuant to contract * * ** (Chapter 143, Acts of the Legislature, Regular Session, 1957, p. 687; Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code of 1961 (Serial Section 1474 (1) (p. 880). (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.— * * * (Chapter 3, Acts of the West Virginia Legislature, Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code of 1961 (Serial Section 1474(2) p. 881).

Section 21. FORM OF CONTRACT; SIGNING.— * * * (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia, 1961 (Serial Section 1474(3) p. 882).

Chapter 20, Article 5, of the Code of West Virginia, 1931, as amended by Chapter 20 of the Acts of the Legislature of West Virginia, Regular Session 1964, p. 1400; Chapter 20, Article 5, Sections 6 et seq. of Michie's West Virginia Code of 1961, 1964 Cumulative Supplement (Serial Sections 2312(16); p. 294, 291:

PART II. SLACK-WATER DAMS.

Section 6. LOCATION AND CONSTRUCTION OF SLACK-WATER DAMS.—The state road commissioner, in constructing public highways, bridges and culverts, as provided by law, and any municipal cor-

poration constructing or improving public streets, viaducts, bridges and culverts, either severally or jointly, upon request of the director of the department of natural resources and with the approval of the state road commissioner, may construct and maintain slackwater dams in connection with such public highways, streets, bridges, culverts or viaducts so as to create reservoirs, ponds, water parks, basins, lakes or other incidental works to conserve the water supply of the state.

Section 7. DAM CONSTRUCTION INITIATED; APPROVAL BY PUBLIC AUTHORITY; COSTS; PLANS.—

• • •

Upon approval of the plans and specifications and the determination to proceed with the project, the director shall enter into an agreement with the public authority on the distribution of the cost and expense of the construction of such dams and incidental works in connection therewith. The portion of the cost to be paid by the department shall be paid from any funds appropriated for or paid into the department and available for such purpose. No public authority shall proceed with the construction of such a project until there is full compliance with the other requirements of law relative to the construction of dams and the director shall have satisfied the public authority that sufficient funds are available for the completion of the dam.

Such dams shall be constructed under and subject to any and all laws governing the construction of state, county or municipal highways, streets, viaducts, bridges or culverts. Any public authority undertaking construction pursuant to this article shall proceed in the same manner as provided for the construction of public highways or street improvements.

• • •

Section 8. REQUESTS TO DIRECTOR FOR DAM CONSTRUCTION; COSTS; PROCEDURE.—

• • •

Section 9. PAYMENT OF DAM COSTS; DEFICIENCIES AND REFUNDS.—

• • • •

Section 10. CONTRACTS FOR DAM CONSTRUCTION.—In the construction of slack-water dams, reservoirs and other incidental works, the state road commissioner and the public authority of a municipality shall proceed as provided by law and shall enter into contracts as provided by law.

• • •

APPENDIX F

R. C. WETHERALL, JR.,

Plaintiff,

VS. Civil Action No. 3921

STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND PAUL PRICE,

Defendants.

PAUL PRICE,

Defendant and Cross Claimant,

VS.

STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Defendants and Cross Defendants.

On motion of the plaintiff R. C. Wetherall, Jr., and the defendant and cross claimant Paul Price, this Court, in addition to the orders made herein, orders it to be and it hereby is certified and by this order made a part of the record of this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments made in this Court on behalf of the plaintiff and on behalf of the cross claimant, upon the motion to dismiss by the defendants, The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, State Road Commissioner, it was insisted and relied upon by said plaintiff and by said cross claimant, that the application of section 35, Article VI of the Constitution of West Virginia, to this case would deprive plaintiff and cross claimant of their property with-

out due process of law contrary to section 1 of the Fourteenth Amendment to the Federal Constitution; and the question was not determined favorably to the plaintiff and to the cross claimant as appears from the entry and final order of dismissal made herein, to all of which counsel for the defendant objects and excepts upon the ground that said issues were not shown upon the record.

This Court further orders it to be, and it is hereby, certified and by this order made a part of the record in this case, that the petition to the Supreme Court of Appeals of West Virginia, from the final order of this Court, having been refused, that this is the highest Court in the State of West Virginia in which a decision could be had.

All of which is accordingly ADJUDGED and ORDERED, and the Clerk directed to enter the within order and certificate in the Order Book of this Court.

ENTER:

FRANK L. TAYLOR,
Judge of the Circuit Court of Kanawha County, West Virginia

PRESENTED BY:

CARNEY M. LAYNE,
Of Counsel for plaintiff, R. C. Wetherall, Jr. and Cross Claimant, Paul Price

INSPECTED BY:

ANTHONY G. HALKIAS,
Counsel for defendants, State Road Commission of West Virginia, a corporation, and Burl A. Sawyers as State Road Commissioner

APPENDIX G

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

R. C. Wetherall, Jr.,

Plaintiff,

v.

Civil Action No. 3921
For Declaratory Judgment
and Coercive Relief

The State Road Commission of West Virginia, a corporation, Burl A. Sawyers, as State Road Commissioner, and Paul Price,

Defendants.

COMPLAINT

TO THE HONORABLE FRANK L. TAYLOR, JUDGE OF SAID COURT:

This action is brought pursuant to the West Virginia Uniform Declaratory Judgment Act, Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and in accordance with Rules 17(a) and 57 of the Rules of Civil Procedure, and the plaintiff, R. C. Wetherall, Jr., says as follows:

I

That the defendant The State Road Commission of West Virginia, hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2, of the Code of West Virginia, 1931, as amended; that the office of State Road Commissioner was created and exists under and by virtue of Chapter 17, Article 2A of the Code aforesaid; that the defendant Burl A. Sawyers, as State Road Commissioner of West Virginia, hereafter referred to as "Road Commis-

sioner", has been duly appointed and is presently acting as such; that the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor; that it is the duty of the Road Commissioner to ascertain the performance of work done under the contract and the amounts due thereunder; and by virtue of Chapter 17, Article 3, Section 4, of said Code, it is the duty of the Road Commissioner to audit the claims of contractors and for those found correct to issue requisitions upon the State Auditor for payment thereof.

II

That on October 28, 1960, the Road Commission, acting through Patrick C. Graney, the then Road Commissioner for the State of West Virginia, did after bid award, enter into a contract, hereafter called "Contract" with the defendant Paul Price, hereafter called "Price", for the construction of Project 5824 and 7645, called "Castlemen Run Road" located in Brooke and Ohio counties, West Virginia, the documents for which contract consist of the following items: (1) The contractor's proposal upon the Commission's form and on its conditions contained; (2) the contract instrument; (3) the Special Provisions to said contract; (4) the contract bond; (5) the plans and drawings, consisting of two separate sets, 33 sheets for the work on the Road Commission right-of-way, and 7 sheets for the work on property of the West Virginia Conservation Commission; and (6) the bound volume designated The Standard Specifications, Roads and Bridges, State Road Commission of West Virginia, Adopted 1952; copies of Items (1) to (4) and a copy of sheets 1-13 inclusive of the roadway plans and sheets and all 7 sheets of the dam and causeway plans of Item 5 are attached hereto and collectively marked Exhibit A, and a copy of the remaining sheets of Item (5) and a copy of Item (6) will be furnished and tendered as Exhibit B upon the request of the Court or either party defendant hereto.

III

That said contract was bid and was entered into upon the basis of unit prices for estimated quantities of items of work and material as estimated by the Road Commission, and the total estimated contract price, based on estimated quantities was $134,895.50; that said estimated quantities are subject to the requirements of the project, being either more or less than estimated, and the total estimated contract subject to being adjusted on the basis of the agreed unit prices for the quantities actually required; that said contract provided among other things, that the Road Commission would each month estimate the amount of work performed by Price and compute the value thereof from the unit prices, and after deducting Five (5) Per Cent retainage, pay Price therefor once a month for the work performed in the preceding month.

IV

That the bid and contract covered (1) highway construction for the Road Commission on its right-of-way, and (2) dam and causeway construction for the Conservation Commission of West Virginia, hereafter called "Conservation Commission", on its recreational area property which adjoined the Commission's right-of-way, and which dam and causeway construction was undertaken by the Conservation Commission through the office and facilities of the Road Commission.

V

That the bid and contract included under the highway construction for the Road Commission itself, work designated as Item 2, Unclassified Excavation, which is paid for as the removal of material, without selection, and which, except to the extent provided in the Special Provisions concerning material for the dam and causeway, was to be dumped in a waste pit.

VI

That the bid and contract included under the dam and causeway construction for the Conservation Commission on its recreational area work designated as Item 3, Borrow Excavation, hereafter called "borrow", and work designated as Item 6, Causeway Embankment Fill, hereafter called "causeway embankment"; that the Special Provisions (Sheet 2 of 7 sheets of Conservation Commission plans and drawings, and Page 3 of Schedule of Prices on bid form) required the material that was to be used in the dam and causeway on the recreational area to be selected and taken from (1) the material removed in the roadway excavation upon the Road Commission's right-of-way, and from (2) the core trench and spillway excavations on the Conservation Commission's property, and the cost of selecting, segregating, hauling, placing and compacting according to the Technical Specifications of the Conservation Commission was required to be included in the unit bid price under said Items 3 and 6.

VII

That Section 2.3.1 of the Standard Specifications describes borrow as material required to complete the roadway and not obtainable within the limits of the right-of-way; that said material was not required to complete the roadway but was required to make the dam and causeway on the Conservation Commission's property used as a recreational area; that if said Conservation Commission's recreational area would be considered "roadway", said Section 2.3.1 is inconsistent with the express provisions of the Special Provisions mentioned in VI above; that Section 1.4.3 of the Standard Specifications provides that in the event of any conflict between the Standard Specifications and the Special Provisions, the latter shall take precedence; and plaintiff avers that the instructions upon the bid proposal and plans and drawings take precedence over Section 2.3.1 of the Standard Specifications, and that Price was to

be paid the unit bid price of sixty cents p
material excavated and removed from the roadway, and which payment was to cover work involved in removal, blasting, digging, etc., and in addition thereto, Price was to be paid the unit bid price of fifty cents per yard for so much thereof as was used in the dam and causeway and which payment was to cover the cost of work involved in selecting, segregating, hauling, placing and compacting in the dam and causeway according to the Conservation Commission's Technical Specifications contained in the Special Provisions.

VIII

That by employment contract dated November 29, 1960, between plaintiff and Price, plaintiff undertook to perform the actual work on said project according to the terms contained therein for ninety per cent (90%) of the unit bid prices less the cost and expenses thereof, a copy of which contract is attached hereto marked Exhibit C; and that plaintiff was to be paid for the same quantities of work for which Price was to receive payment from the Road Commission; that plaintiff did thereafter perform such work, including the unclassified excavation, borrow, and causeway embankment, and did excavate and remove from the roadway on the Road Commission's right-of-way, 115,761 cubic yards of material designated as unclassified excavation, and did select and segregate therefrom and did haul, place and compact in the dam and causeway on the adjoining recreational area property of the Conservation Commission, 41,695.5 cubic yards thereof designated as borrow, and 11,847 cubic yards thereof designated as causeway embankment, measured in place by the Road Commission, and that said project and all of the work included therein has been approved and accepted by the Road Commission, and that plaintiff has a subsisting and beneficial interest in the payment therefor by the Road Commission to Price, and plaintiff is a real party of interest.

IX

Plaintiff is informed and believes that upon the progress of the work included in the unclassified excavation, borrow, and causeway embankment, the Road Commission calculated by monthly estimate the estimated quantities thereof, including borrow, and the amount due therefor at the unit price, and the Road Commissioner issued his periodic requisition therefor, including borrow, upon the State Auditor for payment to Price of the amount therefor, including borrow, due upon each monthly estimate; that upon the completion and acceptance of said work the Road Commissioner calculated the final and total estimate of quantities thereof and the amount due therefor, and allowed for payment said 41,695.5 cubic yards of borrow, 11,847 cubic yards of causeway embankment, and approximately 60,000 cubic yards of unclassified excavation, the last which figure is incorrect; that plaintiff is informed and believes that upon protest from Price as to the quantity of unclassified excavation, the Road Commission recalculated said estimates and increased the unclassified excavation from approximately 60,000 cubic yards to the correct amount of 115,761 cubic yards, but totally eliminated the 41,695.5 cubic yards of borrow, and backcharged the amounts previously paid for such borrow to amounts due upon the unclassified excavation, and that the Road Commissioner has refused to issue his requisition for payment of the work represented by 41,695.5 cubic yards of borrow.

X

That Price has refused to prosecute any claim for payment for such item designated as borrow, and upon request refused to formally assign such claim to plaintiff to prosecute, for the stated reasons he had only a 10% interest therein and that he did not want to antagonize the Road Commission, well knowing that 90% of the loss that would result from a failure to collect such sum due for the work designated as borrow would be borne by plaintiff.

XI

That no dispute exists between any of the parties hereto as to the work performed on the items designated as unclassified excavation and borrow, nor any dispute as to the quantities of said work, but only a dispute as to whether under the terms of the contract the Road Commission is obligated to pay for the borrow. The plaintiff claims Price, and through Price, the plaintiff, is entitled to be paid for 41,695.5 cubic yards of work designated as borrow, as well as to be paid for the work designated as unclassified excavation, for the reason the bid instructions directed the cost of selecting, segregating, hauling, placing and compacting in the dam to be included in the bid price for the item designated borrow; that said borrow work was not on the roadway but was on the recreational area property of the Conservation Commission; and that the Special Provisions having instructed Price and plaintiff as to where the material was to be secured and how the cost of selection, segregation and manipulation was to be paid for, under Section 1.4.3 of the Standard Specifications, said Special Provisions control. The Road Commissioner refuses to pay for said borrow work in the dam for the alleged reason Section 2.3.1 of the Standard Specifications allegedly prohibits payment for borrow coming from roadway excavation, notwithstanding the Road Commissioner approved payment for causeway embankment which also came from roadway excavation.

XII

That Paul Price has been made a defendant hereto so that all parties of conceivable interest are before the Court.

WHEREFORE, Plaintiff prays that the Court will:

1. Declare the right of Paul Price to be paid by the Road Commission the sum of $20,847.75 for the work involved in constructing the dam and being the item designated borrow, in addition to the sum of $69,456.60 for the removal of

118,761 cubic yards of unclassified excavation which has already been approved for payment.

And for further and coercive relief, the plaintiff asks judgment that the Road Commissioner be compelled to perform his statutory duty to issue the requisition of the Road Commission to the State Auditor for the payment to Price for such work, so that plaintiff may be paid therefor by Price, and that plaintiff might have such other and further relief, both general and special, as to the Court may seem appropriate in the premises.

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

TOM T. BAKER
640 Fifth Avenue
Huntington, West Virginia

Attorneys for the Plaintiff,
R. C. Wetherall, Jr.

APPENDIX H

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

R. C. Wetherall, Jr.,
Plaintiff,

vs.

For Declaratory Judgment
and Coercive Relief
Civil Action No. 3921

The State Road Commission of West Virginia, a corporation, Burl A. Sawyers, as State Road Commissioner, and Paul Price,
Defendants.

THE AMENDED ANSWER OF PAUL PRICE TO PLAINTIFF'S COMPLAINT THE CROSS-CLAIM OF PAUL PRICE AGAINST THE DEFENDANTS, THE STATE ROAD COMMISSION, A CORPORATION, AND BURL A. SAWYERS AS STATE ROAD COMMISSIONER

AMENDED ANSWER

1. The complaint fails to state a claim against the defendant Paul Price upon which relief can be granted, because no relief is prayed for against Paul Price.

2. Defendant Paul Price admits the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, XI and XII.

3. Defendant Paul Price denies the allegations contained in Paragraph X of the complaint.

Wherefore, in the premises of the complaint and the admissions and denial in this amended answer contained, the defendant Paul Price joins in the prayer of the plaintiff,

B. C. Wetherall, Jr., and prays the Court to transpose him from a party defendant to a co-party plaintiff.

CROSS CLAIM AGAINST THE STATE ROAD COMMISSION, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

1. Affirmation of allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, XI and XII of plaintiff's complaint.

WHEREFORE, in the premises of plaintiff's complaint and the amended answer of this defendant Paul Price, and the affirmation of allegations as in this cross-claim contained, the defendant and cross-claimant Paul Price prays that the Court will declare his right to be paid by the Road Commission the sum of $20,847.75 for the work involved in constructing the dam, and being the item designated borrow, in addition to the sum of $69,456.60 for the removal of 115,761 cubic yards of unclassified excavation, which has already been approved for payment.

And for further and coercive relief, cross-claimant Paul Price asks judgment that the Road Commissioner be compelled to perform his statutory duty to issue the requisition of the Road Commission to the State Auditor for the payment to him for such work, and that as a cross-claimant he might have such other and further relief, both general and special, as to the Court may seem appropriate in the premises.

MARSHALL, HARSHBARGER & ST. CLAIR
By JAMES W. ST. CLAIR
Attorneys for Cross-Claimant
Paul Price

NOTICE

Please take notice that the undersigned will move the Court for permission to transpose Paul Price from a party

defendant to a co-party plaintiff, and for such other and further relief as is deemed necessary, on November 23, 1963, as soon as counsel can be heard.

MARSHALL, HARSHBARGER & ST. CLAIR,
By JAMES W. ST. CLAIR

CERTIFICATE OF SERVICE

The undersigned counsel for Paul Price does hereby certify that he has served a copy of the foregoing Amended Answer and the Cross-Claim of Paul Price upon Anthony G. Halkias, Attorney for State Road Commission of West Virginia, Capitol Building, Charleston, West Virginia; upon Burl A. Sawyers, State Road Commissioner, Capitol Building, Charleston, West Virginia; upon Carney M. Layne, 638 Fifth Avenue, Huntington, West Virginia, and Tom T. Taker, 640 Fifth Avenue, Huntington, West Virginia, Attorneys for R. C. Wetherall, Jr., by mailing a true copy of the same to each of them at their office, this 15th day of November, 1963.

MARSHALL, HARSHBARGER & ST. CLAIR,
By JAMES W. ST. CLAIR

APPENDIX I

Pertinent Provisions of Contract Document Showing Patent Error in Road Commissioner's Interpretation and Which Trial Court Refused to Interpret.

A. Provisions contained in *Special Provisions and Specifications Pertaining to Dam Construction* authorizing payment for dam construction under Item 3, termed Borrow Pit Excavation.

(1) In The Bid Proposal Directions and On The Plans and Drawings:

The Instructions under "note" on the Proposal Form, Schedule of Prices, page 3, and the directions on Sheet 2 of the 7 Sheets of Plans styled "Conservation Commission of West Virginia, Division of Engineering, Castleman Run Lake No. 1., Brooks and Ohio Counties," (both part of Complaint Exhibit A) provides as follows:

> "Dam and causeway are to be constructed of selected *borrow material obtained from the roadway excavation*, core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. *The cost of selecting and segregating the material, hauling and placing, compacting, and all work necessary in completing the dam and causeway shall be included in the unit cost bid for Item 3 and Item 6.*" (Italics supplied). (Items 3 and 6 and respectively "Borrow Pit Excavation" and "Causeway Embankment Fill"—Ed.)

(2) In The Specifications:

The contract included under the dam and causeway construction an item of work designated Item 3, "Borrow Pit Excavation" (Exhibit A—Proposal, Schedule of Prices, p. 2, Line 10). The dam construction covered by this item and to be paid for by the quantity of material used, is specifi-

cally described in section 3.14 of the "Technical Specifications, Castlemen Run Lake No. 1" (p. 6) (part of Complaint Exhibit A and being a "Special Provision") which reads as follows:

"ITEM NO. 3 BORROW PIT EXCAVATION

3.3 EMBANKMENT

The work covered by this item consists of furnishing all labor, materials and equipment and performing all the excavation and other operation in connection with the construction of embankments, as shown on the plans or as directed by the Engineer.

The term "embankment" shall mean the earth fill portion of the dam.

3.14 BASIS OF PAYMENT

Work under this item shall include the furnishing of all labor, plant and materials necessary for the construction of an earthen embankment and outlet channels in accordance with the drawing and specifications, work to include diversion of creek, cofferdams, stripping, excavation from designated borrow areas and embankment site, transportation and placement of material for embankment construction including clay core, disposal of unsuitable material, grading, compaction of fill with proper moisture content, scarification, backfill adjacent to structures in Item 5, together with any other incidentals necessary to this operation and payment will be made at the price bid per cubic yard measured as excavated from the borrow areas."

B. Provision contained in Road Commission's *Standard* Specifications Roads and Bridges pertaining to Borrow.

Section 2.3.1 page 54, of "The State Road Commission of West Virginia, Standard Specifications Roads and Bridges, Adopted 1953" (414 page blue printed volume—part of Complaint Exhibit A) provides as follows:

"BORROW EXCAVATION
2.3.1 DESCRIPTION

This item shall consist of excavating, transporting, place and finishing material *to complete the roadway and embankments; which material is not obtainable from any other item of excavation or within the limits of the right-of-way.* Borrow Excavation shall be obtained from Borrow Pits as noted on the Plans or otherwise designated by the Engineer, sites for which will be secured and paid for by the Commission." (Italics supplied).

On the supposed basis that the application of this *standard* provision precluded payment for the dam construction under Item 3, Borrow Pit Excavation, the Road Commissioner refused payment, on the ground the material used in the dam came from the right of way excavation, *notwithstanding the proposal, special provisions and plans as heretofore set forth expressly directed it be taken from roadway excavation,* and notwithstanding that by other provisions of the standard specifications hereafter set forth, the proposal, special provisions and plans governed and took precedence over the *standard* specifications.

C. Provision contained in Road Commissions Standard Specifications, Roads and Bridges, giving precedence to proposal, special provisions and plans over standard specification in case of discrepancy or conflict.

Section 1.5.4, page 17, of "The State Road Commission of West Virginia, Standard Specifications, Roads and Bridges, Adopted 1959" (blue printed volume part of Complaint Exhibit A) *designed to give controlling effect to the proposal, plans and any documents which are specially drafted with reference to the particular project,* (as was the "Technical Specifications, Castlemen Run Lake No. 1" for the dam) reads as follows:

"1.5.4 CO-ORDINATION OF SPECIFICATIONS AND PLANS:

These specifications, the Plans, special provisions, and all supplemental documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all.

They are intended to be complementary, to describe and provide for a complete work. *In case of discrepancy*, figured dimensions shall govern over scaled dimensions, *Plans shall govern over Specifications, proposals and special provisions shall govern over both Specifications and Plans.* The Contractor shall not take advantage of errors or omissions in the Plans or of any discrepancy between the Plans and Specifications." (Italics supplied).

The Standard Road Specifications do not cover dam construction, and the dam work was for the Conservation Commission. Accordingly, section 1.4.3 of the Standard Road Specifications is also of applicability and it reads as follows:

"1.4.3 SPECIAL PROVISIONS:

Proposed work or requirements not covered by these specifications will be covered by special provisions. The special provisions shall govern the work as though part of these specifications and shall take precedence whenever in conflict therewith." (Italics supplied).

The "Technical Specifications, Castlemen Run Lake No. 1" (for the dam) describes in detail each of the eight items for dam and causeway construction, and Item 3, "Borrow Pit Excavation," takes up over four single-spaced legal size sheets, describing the work involved in the item. The last section of this item, "3.14 Basis for Payment," previously quoted, states that for the dam construction work "payment will be made at the price bid per cubic yard" of "Borrow Pit Excavation."

Without the application of any rules of construction, the

contract is express as to meaning and the Road Commissioner's "interpretation" is violative of the contract as prepared by the Road Commission itself, and patently wrong.

APPENDIX J

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of March, 1965, the following order was made and entered, to-wit:

R. C. WETHERALL, JR.

VS. **Civil Action No. 3921**

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION,

BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND PAUL PRICE,

Defendants Below,

PAUL PRICE,

Cross-Claimant Below

On a former day, to-wit, January 6, 1965, came the petitioners, R. C. Wetherall, Jr., by Carney M. Layne and Claude M. Morgan, his attorneys, and Paul Price by Marshall, Harshbarger & St. Clair and James W. St. Clair, his attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in this action on the 21st day of May, 1964, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX B

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia
PHILIP J. GRAZIANI
Deputy Attorney General
State of West Virginia
Charleston, West Virginia
C. ROBERT SARVER
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

R.C. WETHERALL, Jr. and Paul Price
v. Appellants
THE STATE ROAD COMMISSION OF WEST VIRGINIA,
A CORPORATION, AND BURL A. SAWYERS,
AS STATE ROAD COMMISSIONER, Appellants

On Appeal from the Circuit Court of Kanawha County, West Virginia

---

Motion to Dismiss Appeal for Lack of Jurisdiction.

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STATEMENT FOR THE CASE

On October 28, 1960, Appellant Price was awarded a contract by appellee State Road Commission involving certain road, dam and causeway construction. On November 29, 1960, Price and appellant Wetherall entered into a contract whereby Wetherall would perform all of the work called for in Price's contract with the State Road Commission and, in return, would receive 90% of the money to be paid Price. At no time was appellee informed of this clandestine agreement and during the course of the work, which dragged on for some time after the scheduled completion date, various subterfuges were employed to disguise the true status of the person actually performing the work.

Upon completion and acceptance of the project, a dispute arose between Price, who still represented himself as having performed the work, and the State Road Commission, over certain provisions in the work specifications. It was only then that appellant Wetherall came upon the scene and commenced a declaratory judgment action in the Circuit Court of Kanawha County, West Virginia, naming Price, the Road Commission and its Commissioner as defendants. This action, filed - September 24, 1963, asked:

1) That a certain provision of the contract between Price and the Road Commission be interpreted and the rights of the parties declared; and,

2) that after an interpretation and declaration of rights, the Road Commissioner be compelled to perform his statutory duty to audit Price's claim for the extra work allegedly performed.

Appellant Price subsequently asked leave of court to become a cross-claimant and such petition was granted.

On May 21, 1964, the Circuit Court of Kanawha County entered its final order sustaining appellees' motion to dismiss appellants' complaint and cross-claim. It is this judgment order from which relief is sought..

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of The Supreme Court of the United States, move that the jurisdictional

statement of appellants be dismissed on the ground that the judgment rest on an adequate non-federal basis; and, that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on in the court below.

ARGUMENT

I

It is manifestly clear that the dismissal of the complaint as to appellant Wetherall was based on an adequate non-federal ground, that is, he was not a real party in interest as contemplated by Rule 17 (a) of the West Virginia Rules of Civil Procedure. (see appendix A.) It is noted that the West Virginia and Federal provisions are very similiar. The trial court correctly held that Wetherall was not within the scope of Rule 17 (a) since:

> "Most authorities agree that the real party in interest is the party who, by the substantive law, possessed the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." 2 Federal Practice and Procedure, Barron and Holtzoff, §482, page 7, et. seq.

Rule 17 (a) of the Federal Rules of Civil Procedure has been construed to require that actions shall be prosecuted in the name of the real party in interest who is the person owning, either legally or equitably, the claim upon which relief is sought, according to the substantive law of the state. Rosenfeld v. Continental Building Operating Co., 135 F. Supp. 465; Capo v. C-O Two Fire Equipment Co., 93 F. Supp. 4. Rule 17 (a) 's intent is to require that the action be prosecuted in the name of the party, who by the substantive law, has the right sought to be enforced. Rock Drilling etc. v. Mason et al, 217 F2 687; (cert. denied 349 U.S. 915). 3 Moore's Federal Practice (2nd Ed.) pp. 1305-1311.

In Ison et al v. Crisp Corp., 146 W.Va. 786, the West Virginia court quotes with approval the following language from German Alliance Insurance Company v. Home Water Supply Co. 226 U.S. 220:

> "* * * a contract is only intended for the benefit of those who made it.
>
> Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he

must at least show that it was intended for his direct benefit." (Emphasis supplied).

Appellant Wetherall sought the construction of a contract to which he was not a party. The decision of the trial court, found as Appendix A to Appellants' Jurisdictional Statement, shows that more than a month elapsed between the date of the contract between Price and Appellees' and the date of the "employment contract" between appellants. By various stratagems and for unknown reasons, appellants conspired to convince appellees' agents that Price was actually the party performing the work. The contract performance bond listed Price as the principal and one wonders whether Wetherall would have come forward so quickly had Price been sued on his bond. The facts are plain that Wetherall was not a party to the contract and, that if he has any cause of action, it is against Price.

II

The judgment of the Circuit Court of Kanawha County also rests on an adequate non-federal ground in dismissing Price's cross-claim since the court did not preclude Price from any relief at all, but merely told him that he was proceeding in the wrong manner. Since there is no doubt that a proceeding in mandamus would only lie where there is involved the performance of a plain legal duty, not involving the performance by public officials of discretion or judgment, Draper v. Anderson, 102 W.Va. 633, it becomes evident that Price should have resorted to the claims procedure established in the State of West Virginia. Chapter 14, Article 2 of the Code of West Virginia (Michie) states:

"The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest."

Prior to 1953, these matters came under the State Court of Claims, but now they are administered by the Attorney General, who, like the Court of Claims, "* * * is hereby authorized to act as a special instrumentality of the legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, * * *" cannot be heard in a court of law * * *." Code 14-2-3.

(Section 35, Article VI is the governmental immunity from suit provision.)

Code 14-2-4 confers the Attorney General's jurisdiction:

"The jurisdiction of the attorney general, under the provisions of this article, except for the claims excluded below, shall extend to the following matters:

"1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

"2. Claims and demands, liquidated and unliquidated, ex-contractu and ex-delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.

"3. The legal or equitable status, or both, of any claim referred to the attorney general by the head of a state agency for advisory determination."

Code 14-2-5 provides:

"The jurisdiction of the attorney general shall not extend to any claim:

"1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

"2. For injury to or death of an inmate of a state penal institution.

"3. Arising out of the care or treatment of a person in a state institution.

"4. For a disability or death benefit under chapter twenty-three of this Code.

"5. For unemployment compensation under chapter twenty-one-a of this Code.

"6. For relief or public assistance under chapter nine of this Code.

"7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

There is nothing in the record to show that Price attempted to avail himself of the easily accessible claims procedure.

Appellant Price enjoyed the choice of another course of action as well in that, since he complains that his property has been taken without due process, he could have instituted proceedings to have

the Road Commissioner condemn his property by eminent domain.

Article III, Section 9 of the Constitution of West Virginia states, in part:

> "Private property shall not be taken or damaged for public use without just compensation."

Appellees admit that the concept of Eminent Domain as it pertains to property other than real property or interests therein is not as well known as the realty aspect. It must be noted, however, that the concept is not unknown in several jurisdictions.

Speaking of the Federal Constitutional provision that private property shall not be taken for public use without just compensation, it has been said:

> "The Constitutional provision is addressed to every sort of interest the citizen may possess."

U.S. v. General Motors, 323 U.S. 373; U.S. v. Certain Lands, etc, 220 F. Supp. 696.

In the case of Graham v. City of Duncan, 354 P2d 458, the syllabus by the Oklahoma court states:

> "The term 'property' as used in the Oklahoma constitution... regarding the taking of private property for public use for which just compensation must be paid includes not only real estate held in fee, but also ensement, personal property and every valuable interest which can be enjoyed and recognized as property."

The case of Lynch v. U.S., 292 U.S. 571, has held that a valid contract was property.

It is believed that Price could have, and still can, avail himself of the remedy of mandamus; not a mandamus as envisioned in Draper (supra) but rather a mandamus to compel the State Road Commissioner to institute eminent domain proceedings against his 'property.' A full hearing on the facts is assured and the discretion of the Commissioner is not forced. The following cases state that such a mandamus action will be as pertaining to real estate. State v. Graney, 143, W.Va. 643; Riggs v. State Road Commissioner, 120 W.Va. 298; Hardy v. Simpson, 118 W.Va. 440; Childers v. State Road Commissioner, 124 W.Va. 233.

III

It is evident from the record, and from appellants' jurisdictional statement that the issue of the repugnance of Section 35, Article VI

of the West Virginia Constitution to any provisions of the Federal Constitution was not raised in a timely fashion.

Section 1257 (2), Title 28, United States Code, relied upon by Appellants for their jurisdiction before this Court, requires that the repugnance be raised by timely insistence in the state court. In Raley v. State of Ohio, 360 U.S. 423, this Court stated :

> "It is essential to our jurisdiction on appeal . . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution."

In Slagle v. Ohio, 366 U.S. 259, it is held that appellants must show that a "timely" insistance was made in the state courts and that a state statute as applied is repugnant to the Federal constitution. Otherwise, an appeal will be dismissed.

An examination of the complaint originally filed by Wetherall, and later ratified by cross-claimant Price, fails to disclose any mention of the alleged taking without due process of law. (See Appendix G and Appendix H in Appellants Jurisdictional Statement) The opinion of court below, reproduced as Appendix A in Appellants' Jurisdictional Statement, makes no specific or general mention of the issue of due process.

Subsequently, appellants procured an order of the trial court stating that the

> "application of section 35, Article VI of the Constitution of West Virginia, to this case would deprive (appellants) of their property without due process of law contrary to section 1 of the 14th Amendment to the Federal Constitution."

It will be noted (Appendix F, Appellants' Jurisdictional Statement) that Appellees strenuously objected and excepted to this on the grounds that the assertion was not shown on the record. This subsequent court order, which was not secured until June of 1965, is the first instance wherein the Federal questions are raised.

CONCLUSION

As noted in appellant's jurisdictional statement at page 12, this case is similiar in many respects to Appeal No. 144, October, 1965, term of this Court. It cannot be too strongly urged that this Court should not take jurisdiction of this case for the reasons as set out herein. It is believed that appellants are not within the purview of 28 USC §1257 and it is respectfully submitted that their ju-

risdictional statement should be dismissed.

September 2, 1965

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APPENDIX A

Rule 17.

Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, or any other fiduciary, or a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in his own name without joining with him the party for whose benefit the action is brought; and in subrogation and similar cases, the court shall apply this subdivision as will promote justice. When a law of the State so provides, an action for the use or benefit of another shall be brought in the name of the state or any political subdivision thereof.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

WETHERALL ET AL *v.* STATE ROAD COMMISSION OF WEST VIRGINIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY.

No. 428. Decided October 25, 1965.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. *Price d/b/a Howard Price & Co.* v. *State Road Commission of West Virginia et al.*, No. 144 October Term 1965, decided October 11, 1965.

APPENDIX D

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

Frank L. Taylor
Judge

March 11, 1966

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Gentlemen:

R. C. WETHERALL, JR. v. STATE ROAD COMMISSION, et al

By order of this Court, entered January 5, 1966, the petition in this case was filed and a rule in mandamus issued, directed to the respondents to show cause why a writ of mandamus should not be awarded compelling the relief prayed for in the petition. The petition states that "The subject matter of this proceeding is the same as in Civil

Action No. 3921, styled 'R. C. Wetherall, Jr. and Paul Price vs. The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner' '', and recites the former determination thereof. Attached to the petition are several exhibits, including the pleadings and decision in the former case, as a part of the Jurisdictional Statement filed in the United States Supreme Court. In view of the fact that the subject matter of this proceeding is the same as in the former case, and since my opinion in the former case is made a part of the record in this case, I see no reason to again recite the material allegations of the petition.

This case now comes on upon the respondents' demurrer to the petition, filed January 20, 1966, setting forth ten separate grounds in support thereof. The first ground of the demurrer states that the petition is not sufficient in law, in that it asserts an action against the State for the recovery of money alleged to be owing under a highway construction contract between petitioner Paul Price and the respondents, such action being prohibited by Article VI, Section 35 of the Constitution of West Virginia. The factual situation, as shown by the petition in this case, is very similar to that in the case of *Howard Price* v. *The State Road Commission,* decided by me on this date, in that it is alleged that the petitioners performed construction work under a contract with the State Road Commission for which they have not been paid. In the instant case, it is alleged that work was performed under the terms of the contract with the Road Commission; that for some of the work done the Road Commission calculated monthly quantities thereof and certified the amounts due to the State Auditor, but that upon completion and acceptance of the work, the amount of work calculated and compensation certified was arbitrarily revised to eliminate a portion thereof, depriving the petitioners of payment therefor. Whereupon, the petitioners assert a property right in the said contract and in the work performed and material furnished, and contend

that they may not be deprived thereof without just compensation, perforce the Fifth Amendment to the Federal Constitution and Article III, Section 9 of the State Constitution.

The constitutional question raised by the first ground of the respondents' demurrer is discussed by me in the decision in the *Howard Price* case, of this date, and for the reasons therein stated, the demurrer will be sustained upon this ground. I would, however, as in the *Howard Price* case point out that while there are situations wherein our Supreme Court of Appeals, under the provisions of the State and Federal Constitutions, prohibiting the taking of private property without just compensation, will compel condemnation in order to compensate the property owner, the clear legal right required to be shown by the petitioner, does not appear here. Moreover, the particular circumstances of the dispute involving the contract in this case have been formerly considered by me upon the question of demonstrating a clear legal right, in the former adjudication between the parties, and decided adversely to the petitioners. Accordingly, grounds 2 and 7 of the demurrer are sustained as *res judicata*.

Grounds 3 and 4 of the demurrer assert that respondents have not taken any property or property right of the petitioners which is the subject of an eminent domain proceeding. The subject matter of this proceeding, being essentially the same as that in the *Howard Price* case, I am of opinion to sustain these grounds of the demurrer for the reasons given in my ruling in the *Howard Price* case, of even date.

Grounds 5 and 6, pertaining to the possibility of administrative relief through the office of the Attorney General, are also discussed by me in the opinion in the *Howard Price* case, and will be overruled for the reasons therein assigned.

Grounds 8, 9 and 10 of the demurrer, relating only to

petitioner Wetherall's claim, asserting that he is not a real party in interest since he was not a party to the contract, are grounds upon which the former proceeding involving these parties was dismissed and are, accordingly, *res judicata*. These grounds will, therefore, be sustained.

For the reasons heretofore given, the demurrer will be sustained as to grounds 1, 2, 3, 4, 7, 8, 9 and 10. An order carrying into effect these rulings, dismissing the petition, and denying the writ of mandamus, should be promptly tendered for entry and should make this letter memorandum of opinion and the memorandum of opinion in the *Price* case a part of the record. Copies for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

APPENDIX E

State of West Virginia
THIRTEENTH JUDICIAL CIRCUIT
Charleston

Frank L. Taylor
Judge

March 11, 1966

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Gentlemen:

Howard Price, dba Howard Price and Company vs. The State Road Commission of West Virginia and Burl A. Sawyers as State Road Commissioner

In 1963 this plaintiff instituted an action in this Court against the State Road Commission of West Virginia, the Road Commissioner, individual members of the Road Commission, and the Director of the Construction Division of the Road Commission, praying for declaratory relief and for coercive relief, to compel the then defendants to cause

to be paid to him from State funds an amount of money which he claimed to be due under a construction contract entered into between him and the State Road Commission. That case was subsequently heard on a motion to dismiss, which motion was sustained upon the ground that it was an action against the State within the inhibition of Article VI, Section 35 of the West Virginia Constitution. That section is as follows:

> "The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

From the judgment of this Court in dismissing his action the plaintiff appealed to the Supreme Court of Appeals of West Virginia, and that Court declined appellate relief: The plaintiff then appealed to the Supreme Court of the United States for a writ of certiorari to review the findings of this Court and of the Supreme Court of Appeals, whereupon the Attorney General of West Virginia, who is required by statute to represent the State in all matters pending in Federal courts, appeared and made a motion to dismiss upon the ground that the appellant, plaintiff here, failed to make use of remedies available to him under State statutes. These remedies were described by the Attorney General as being (1) a proceeding in mandamus to compel eminent domain proceedings, and (2) the claim procedure against the State as provided for in Chapter 14, Article 2 of the Code of West Virginia. Thereupon, the Supreme Court of the United States, by a *per curiam* opinion, dismissed the appeal upon the representations of the Attorney General.

The plaintiff has now filed his petition in this Court praying for a writ of mandamus to compel the present defendants, that is, The State Road Commission of West Virginia,

a corporation, and Burl A. Sawyers as State Road Commissioner, to institute and prosecute an eminent domain proceeding in the proper court to condemn and ascertain the value of the rights of the plaintiff under his construction contract with the State. The rule in mandamus was granted, and the defendants, not now represented by the Attorney General, demurred to the petition upon several grounds. The first of these grounds is that this proceeding contravenes the provisions of Article VI, Section 35 of the Constitution. The petitioner here strongly contends and argues that Article VI, Section 35 of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner.

I have carefully compared the petition herein with the complaint formerly filed, which complaint was exhibited with the petition. The petition here, aside from the demand for mandamus, is in effect and by similarity of language practically the same as the complaint filed in the former action. The contract is described in the same manner, the alleged default is described in the same manner, and the claim asserted by the petitioner is practically for the same amount of money, it having been increased slightly in this petition over the amount demanded in the complaint in the former action.

Many questions have been argued and briefed by counsel dealing with issues which they claim arise in this case. However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding, and the second is whether or not the Attorney General, by his action in appearing before the Supreme Court of the United States and making

the motion to dismiss, has estopped the State from its right to defend upon the ground that this is in effect an action against the State.

As noted, Article VI, Section 35 of the Constitution of West Virginia differs from the Federal Constitution in that it prohibits absolutely any action against the State, except in garnishment proceedings, whereas the Federal Constitution makes provision that the Government of the United States may not be sued without its consent. It is apparently the Federal rule that contract rights between the nation and individuals are only binding upon the conscience of the sovereign, and have no compulsive force and confer no right of action independent of the will of the sovereign. See *Monaco* v. *Mississippi*, 292 U.S. 313, 78 L. ed. 1282, and *Lynch* v. *United States*, 292 U.S. 571, 78 L. ed. 1434. However, in *Miller* v. *Board of Agriculture*, 46 W. Va. 192, dealing with the West Virginia Constitution, it was held that "A mere contract will not be enforced by mandamus." In discussion of this point, the following language is used in the opinion written by Judge Brannon:

> "* * * A contract with the State is without legal sanction, as it cannot be enforced by judicial action. The only remedy is appeal to the officers charged with its execution, and, when executed, to the Legislature to pay. * * *."

It is true that in that instance the Court was speaking of an executory contract, but it is my opinion that the principle prevails here. I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here.

This question, however, is not completely controlling. The action of the Attorney General in making his motion in the Supreme Court of the United States may or may not have been ill-advised. It is true that the Attorney General of West Virginia is the chief law officer of the State. See

State v. *Ehrlick*, 65 W.Va. 700. However, the question here is whether, being clothed with this authority, the Attorney General can estop the State and waive its rights. As was said in *State* v. *Chilton*, 49 W.Va. 453, 456:

> " 'Grants of power to public officers are usually subjected to strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied. Such an officer can create rights against the State or other public authority represented by him only while he is keeping strictly within the limits of his authority as so construed.' * * * 'This rule is indispensible to guard the public against loss and injury from the fraud, mistake or rashness and indiscretion of their agents.' * * *."

I have read much authority upon the question of judicial estoppel arising in instances such as this, some of which has been cited to me by counsel and some of which I have discovered by my own research. It is said in *7 Am. Jur. 2d, Attorney General*, § 15:

> "Although there is some authority to the contrary, it is generally held that unless duly authorized by law, the attorney general may not waive the immunity of the state from suit, and thus cannot bind the state by appearing in an action so as to give the court jurisdiction. Nor can the attorney general give up rights of the state by an admission in court as to the legal effect of a statute."

In *19 Am. Jur., Estoppel*, § 77, the rule is laid down that a court cannot acquire jurisdiction of the subject matter of litigation by estoppel.

And in *49 Am. Jur., States, Territories and Dependencies*, § 96, it is stated in a footnote that where the State merely makes a special appearance for the purpose of protesting against the court's jurisdiction, there is no waiver of immunity.

In *Cunningham* v. *County Court of Wood County* (W.Va. 1964), 134 S.E. 2d 725, it is said at page 729:

> "The general rule is that estoppel may not be invoked against a governmental unit when functioning in its governmental capacity. 31 C.J.S. Estoppel §§ 138-142, pages 675-719; Anno., 1 A.L.R. 2d 338."

In the annotation just referred to in the quotation, the subject is discussed and many cases are cited with the statement made that claims cannot be created against the State by estoppel.

In the recent case of *Main* v. *Department of Highways* (Va. 1965), 142 S.E. 2d 524, the statement is made that the doctrine of estoppel cannot apply to the rights of a state when acting in its sovereign or governmental capacity. See also *Ford Motor Company* v. *Treasury Department*, 323 U.S. 459, 89 L. ed. 389.

While the foregoing discussion, in my opinion, necessitates action on my part in sustaining point one of the demurrer, and while I believe that to be decisive of the controversy presented on this record, yet, being in this instance a court of original jurisdiction, it is probably incumbent upon me to rule upon the other questions raised on the record. While I personally entertain considerable compassion for the petitioner here, he being left, in the words of Judge Brannon, *supra*, as having a contract without legal sanction which cannot be enforced by judicial action, yet I must take further note of the position taken by the Supreme Court of Appeals in *Cunningham* v. *County Court of Wood County, supra*, in which it is said that:

> "* * * This Court * * * is sternly and unmistakably enjoined to leave drastic changes in the common law to the legislative branch of the state government. Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principal which has through a long period of years been so basic in the laws of this state."

If that be true, how much more incumbent it is upon me as a judge of a *nisi prius* court to observe the Constitution and the common law of the state, and to declare as constitutional that part of the common law which has so long been pronounced in this State. I personally am of opinion that the doctrine of immunity of the sovereign as stated in our Constitution, is archaic and completely out of step with the times, when we observe the government, state and federal, engaging in big business. However, this is the rule, and I do not believe that I have the authority, or the right, or the duty to declare that Section VI, Article 35 of the Constitution of West Virginia contravenes any other section or part of either the Federal or State Constitution.

The second ground of the demurrer, to the effect that this properly involves the exercise of discretion on the part of the respondents, has already been decided by me in the former opinion written in the other proceeding on April 13, 1964, and is, in my opinion, now *res judicata*.

Grounds 3, 4, 5 and 6 of the demurrer relate to the type of property which is sought to be compelled to be condemned by this proceeding, and in my opinion the discussion had heretofore in this memorandum is decisive of those questions.

Ground 7 of the demurrer raises the question of whether or not the petitioner should have pursued and exercised his remedies of prosecuting a claim against the State through the office of the Attorney General. While this may be a proper answer in this kind of case (*Miller* v. *Board of Agriculture, supra*), yet I am not prepared to say that the prosecution of such a claim constitutes a legal remedy and gives the petitioner a day in court. However, I do not believe that it is necessary to rule upon that ground of the demurrer since here the petitioner is seeking to have his rights determined by a court and not by the executive and legislative branch of the government.

Grounds 8 and 9 raise the question of *res judicata*, and as heretofore indicated, I believe that the questions to which those grounds of the demurrer relate were decided by me in the former proceeding.

The tenth ground of the demurrer asserts that the petition fails to show a clear legal right in the petition. Even assuming that the petitioner has, by virtue of his contract with the Road Commission, acquired a vested property right subject to condemnation, and recognizing that our State Supreme Court of Appeals has construed Article III, Section 9 of the West Virginia Constitution as authority for instituting a suit to compel the State Road Commissioner, by mandamus, to compensate owners of property taken for road purposes, it is an established requirement in this State that such a suit must be predicated upon a showing of a clear legal right to the relief sought. As heretofore indicated, I have carefully compared the petition herein with the petition in the former proceeding and find that they are substantially identical, and that the present petition fails to show a clear legal right in the petitioner.

The eleventh ground of the demurrer, in my opinion, goes outside the record, and should be overruled, but I believe this ground bears no relation to the case at hand.

For the foregoing reasons, based upon the authorities cited herein and in the former opinion, which is exhibited with the record, and based upon the conclusions which I have reached, it is my judgment that the petition here in mandamus is merely a further effort on the part of the petitioner to enforce a right which, under the West Virginia Constitution, he cannot enforce in this proceeding, and I am, therefore, of opinion to sustain points 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the demurrer, deny the writ of mandamus, and dismiss the petition.

A proper order in conformity herewith, and making this letter memorandum of opinion a part of the record, should

be tendered promptly for entry. A copy for that purpose may be obtained from my secretary.

Very truly yours,
/s/ FRANK L. TAYLOR
Frank L. Taylor, Judge

APPENDIX F

R. C. WETHERALL, JR. AND
PAUL PRICE

v. UPON MANDAMUS—No. 6097

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS AS STATE ROAD COMMISSIONER

On the 29th day of January, 1966 came the Petitioners R. C. Wetherall, Jr. and Paul Price, by Carney M. Layne, Charles W. Yeager and James W. St. Clair, their counsel, and came the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, by Anthony G. Halkias, their counsel; and this matter having been regularly docketed for further proceeding this date, came on to be heard upon the mandamus petition, the order entered January 5, 1966 filing said petition; upon the rule directed to the Respondents to show cause why a writ of mandamus should not be awarded against them as prayed for in said petition, issued on January 5, 1966, returnable to January 15, 1966, allowing Petitioners to January 22, 1966 to demur or reply to Respondents' answer, if any, and setting the matter down for hearing on January 29, 1966; upon Respondents' demurrer to said petition and Respondents' answer to said petition filed January 21, 1966; upon Petitioners' demurrer to Respondents answer and Petitioners' reply to Respondents' answer filed January 29, 1966; and the same was argued by counsel, both orally and by brief.

Whereupon the Court took time to consider its decision and after mature deliberation of Respondents' demurrer to the petition, is of the opinion to and doth hereby SUSTAIN Points 1, 2, 3, 4, 7, 8, 9 and 10 of Respondents' demurrer to said Petition, and does OVERRULE Points 5 and 6 thereof; all for the reasons expressed in a letter memorandum of opinion of the Court dated March 11, 1966,

rendered in this case and in a letter memorandum of opinion of the Court dated March 11, 1966 rendered in the case of *Howard Price dba Howard Price and Company* v. *The State Road Commission* et al., Civil Action No. 6098, which letter memorandum of opinion are ordered to be, and are hereby, filed herein as a part of this order and made a part of the record in this cause. And having so ruled it became unnecessary to rule upon Respondents' answer or Petitioners' demurrer and reply thereto.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. The writ of mandamus prayed for in the aforesaid petition, be, and the same is hereby, denied;
2. Petitioners' prayer in the alternative as in the petition contained for other and further relief by way of declaratory judgment, be, and the same is hereby, denied;
3. The petition herein be, and it is hereby, dismissed without prejudice, and;
4. Respondents be, and they are hereby, awarded judgment against the Petitioners for their costs in their own behalf expended and a statutory fee of Ten ($10.00) Dollars.

To which action of the Court in overruling Points 5 and 6 of their demurrer, the Respondents, by counsel, did object and except.

And to which action of the Court in sustaining the aforesaid points of Respondents' demurrer, in denying the writ as prayed for, in denying other and further relief in the alternative by way of declaratory judgment, and in dismissing their petition, Petitioners, by counsel, did object and except for the following reasons:

1. The application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable

to the State by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives Petitioners of their property without due process of law, and constitutes the taking of private property for public use without compensation.

2. The state has consented to suit against Respondents by its participation of the highway project in the Federal Highway Program, and the application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce.

3. The inapplicability to this proceeding of Section 35, Article VI of the Constitution of West Virginia became the law of this case by virtue of the per curiam opinion of the Supreme Court of the United States rendered on Respondents' motion in appeal of Civil Action 3921 from this Court, and Respondents are judicially estopped from asserting such constitutional provision in this mandamus proceeding.

4. Petitioners' work, services, labor and material performed pursuant to the contract, incorporated in the dam for public use and appropriated by Respondents, is within the protection of the due process clause of Section 1 of the Fourteenth Amendment to the Federal Constitution and within the protection of the Fifth Amendment to the Federal Constitution as made applicable to the State by the Fourteenth Amendment, and it is a proper subject for eminent domain proceedings.

5. Petitioners have in good faith shown a reasonable cause to believe the question of their property rights, and the taking thereof, should be judicially resolved and such constitutes a clear legal right in a mandamus proceeding to compel eminent domain proceeding.

6. The application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to and denies Petitioners the rights guaranteed to them under Sections 9, 10 and 17, Article III of the Constitution of West Virginia.

7. The proceeding is not a suit against the State within the prohibition of Section 35, Article VI of the Constitution of West Virginia for the reasons (1) it involves the construction of a public dam and highway under contract to a private party, (2) is a proceeding to compel the performance of constitutional and statutory duties by Respondents, and (3) any expenditure that might ultimately be made on eminent domain proceeding would not come from the general revenue of the State bnt would come from the money specifically appropriated for the dam construction and transferred by the Conservation Commission to the State Road Commission for the express purpose of paying Petitioners for their work, services, labor and material incorporated in the public dam, and deposited in the State Road Fund as segregated by Section 52, Article VI of the State Constitution.

8. The Court's ruling is contrary to the law and the pleadings.

9. The decision of the Court in Civil Action 3921 is not res judicata as to this mandamus proceeding since the object of this proceeding and relief sought herein is not responsive to the pleading in declaratory judgment.

10. Such other reasons as Petitioners may assign on appeal.

Dated this 25th day of June, 1966.

ENTER:

FRANK L. TAYLOR
Judge

INSPECTED BY:
ANTHONY G. HALKIAS
Counsel for Respondents

CARNEY M. LAYNE
CHARLES W. YEAGER
Counsel for Petitioner,
R. C. Wetherall, Jr.

JAMES W. ST. CLAIR
Counsel for Petitioner,
Paul Price

APPENDIX G

STATE OF WEST VIRGINIA

At a regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of December, 1966, the following order was made and entered, to-wit:

R. C. WETHERALL, JR. and PAUL PRICE

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, August 24, 1966, came the petitioners, R. C. Wetherall, Jr., by Carney M. Layne and Charles W. Yeager, his attorneys, and Paul Price, by James W. St. Clair, his attorney, and presented to the Court his petition praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX H

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of February, 1967, the following order was made and entered, to-wit:

R. C. WETHERALL, JR. and PAUL PRICE

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, January 12, 1967, came again the petitioners, R. C. Wetherall, Jr., by Carney M. Layne and Charles W. Yeager, his attorneys, and Paul Price, by James W. St. Clair, his attorney, and presented to the Court his first and second petitions praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petitions, and notes of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused on this second application.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX I

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code (unofficial) conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor* or others, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission,* pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the commission's requisition upon the auditor of the State therefor,* showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the Treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; Chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia. (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR.

—*All work of construction* • • • *of state roads* • • •, *and the furnishing of all materials and supplies therefor* • • • *shall be done and furnished pursuant to contract* • • • (Chapter 143, Acts of the Legislature, Regular session, 1957, p. 687, Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code. (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.—

• • • (Chapter 3, Acts of the West Virginia Legislature, Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code.

Section 21. FORM OF CONTRACT; SIGNING.—

• • • (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia.

Chapter 20, Article 5, of the Code of West Virginia, 1931, as amended by Chapter 20 of the Acts of the Legislature of West Virginia, Regular Session, 1964, p. 1400; Chapter 20, Article 5, Sections 6 et seq. of Michie's West Virginia Code:

PART II. SLACK-WATER DAMS.

Section 6. LOCATION AND CONSTRUCTION OF SLACK-WATER DAMS.--The state road commissioner, in constructing public highways, bridges and culverts, as provided by law, and any municipal corporation constructing or improving public streets, via-

ducts, bridges and culverts, either severally or jointly, upon request of the director of the department of natural resources and with the approval of the state road commissioner, may construct and maintain slack-water dams in connection with such public highways, streets, bridges, culverts or viaducts so as to create reservoirs, ponds, water parks, basins, lakes or other incidental works to conserve the water supply of the state.

Section 7. DAM CONSTRUCTION INITIATED; APPROVAL BY PUBLIC AUTHORITY; COSTS; PLANS.—

* * *

Upon approval of the plans and specifications and the determination to proceed with the project, the director shall enter into an agreement with the public authority on the distribution of the cost and expense of the construction of such dams and incidental works in connection therewith. The portion of the cost to be paid by the department shall be paid from any funds appropriated for or paid into the department and available for such purpose. No public authority shall proceed with the construction of such a project until there is full compliance with the other requirements of law relative to the construction of dams and the director shall have satisfied the public authority that sufficient funds are available for the completion of the dam.

Such dams shall be constructed under and subject to any and all laws governing the construction of state, county or municipal highways, streets, viaducts, bridges or culverts. Any public authority undertaking construction pursuant to this article shall proceed in the same manner as provided for the construction of public highways or street improvements.

* * *

Section 8. REQUESTS TO DIRECTOR FOR DAM CONSTRUCTION; COSTS; PROCEDURE.—

• • •

Section 9. PAYMENT OF DAM COSTS; DEFICIENCIES AND REFUNDS.—

• • •

Section 10. CONTRACTS FOR DAM CONSTRUCTION.—In the construction of slack-water dams, reservoirs and other incidental works, the state road commissioner and the public authority of a municipality shall proceed as provided by law and shall enter into contracts as provided by law.

• • •

APPENDIX J

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

R. C. WETHERALL, JR. and PAUL PRICE

Petitioners,

v.

UPON MANDAMUS

With other appropriate relief thereunder, including alternatively, for declaratory judgment with coercive relief

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Respondents.

PETITION

TO THE HON. FRANK L. TAYLOR, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA:

The Petitioners, R. C. Wetherall, Jr. and Paul Price, say as follows:

This is a proceeding in mandamus brought to compel the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, to institute proceedings in eminent domain to legally acquire from Petitioners and to pay them just compensation for, certain property belonging to Petitioners and wrongfully appropriated by the Respondents by virtue of (1) Respondents abrogation of the terms of a certain highway and dam construction contract between Petitioner Paul Price and Respondents, and (2) Respondents' wrongful appropriation for public use of work, services, labor and material performed and supplied by Petitioners and in-

corporated in a public dam construction project, and for which Petitioners have not been paid.

The subject matter of this proceeding is the same as in Civil Action No. 3921, styled "R. C. Wetherall, Jr. and Paul Price vs. The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner", instituted in the Circuit Court of Kanawha County, West Virginia. In that proceeding the Petitioners sought a declaration of their rights under the highway and dam construction contract here involved. Particularly they sought a declaration that they were entitled under the terms of the contract to have certified under the contract item designated Borrow Pit Excavation, the performance of their work, services, labor and material involved in constructing the dam, and to be paid therefor according to such item the sum of $20,847.75. In addition, Petitioners sought coercive relief compelling the Road Commissioner to certify the performance of such work and to issue his requisition to the State Auditor for the payment thereof. In such declaratory judgment proceeding the Respondents filed a motion to dismiss said proceeding on the grounds the same constituted an action against the State of West Virginia within the prohibition on Section 35, Article VI of the State Constitution. Said motion was sustained, and the proceeding dismissed.

On appeal to the Supreme Court of Appeals of West Virginia the petition for review was denied. Petitioners then appealed to the Supreme Court of the United States. The ground for such appeal was that the application of said State constitutional provision to the facts of this case deprived Petitioners of their property for public use without due process of law, and denied them a day in Court, in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution and in violation of the Fifth Amendment to the Federal Constitution as made applicable to the States by said Fourteenth Amendment. The Re-

spondents, appearing by the Attorney General of this State, filed a motion to dismiss and represented to said Court that the Petitioners had an adequate remedy through the institution of proceedings in mandamus to compel the Respondents to institute proceedings under eminent domain to ascertain just compensation for the property taken from Petitioners. The Supreme Court of the United States by per curium opinion at the October Term, 1965, dismissed the appeal, — U.S. —, 15 L Ed. 2d 37, 86 S Ct.—, citing as authority therefor the companion case at the same term (then also on appeal from this Court), styled *Howard Price, dba etc.* v. *The State Road Commission of West Virginia, et al,* the opinion in which companion case dismissed the appeal in "light of the representations of the Attorney General of West Virginia that there is open to Appellant an effective state procedure of which he has not availed himself." — U.S.—, 15 L Ed. 2d 8, 86 S Ct. —. Such prior proceeding is here pleaded so that the Court may take judicial notice thereof, and there is attached hereto marked Exhibit A, and made a part hereof, the same as if verbatim copied herein, pertinent portions of the record of such prior proceeding.

Petitioners now avail themselves of such procedure as represented by the Attorney General, and the subdividing titles being placed for convenience of reference only, further says as follows:

I

THE DEFENDANTS

A.

1. The Respondent, The State Road Commission of West Virginia, sometimes hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2, of the Code of West Virginia, 1931, as Amended. The office of State Road Commissioner was created and exists under and by

virtue of Chapter 17, Article 2A of the Code aforesaid. The Respondent, Burl A. Sawyers as State Road Commissioner of West Virginia, sometimes hereafter referred to as "Road Commissioner", has been duly appointed and is presently acting as such. By virtue of the Chapter and Articles of the Code aforesaid, the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor and to institute, prosecute, defend, suits, actions and proceedings and to otherwise exercise all powers, and functions necessary and germane to the Road Commission's public corporate existance and purposes. By virtue of Chapter 20, Article 5, Part II of the Code aforesaid, Respondents are authorized in connection with the construction of highways, to construct slack water dams, for the Conservation Commission of West Virginia, hereafter called "Conservation Commission" at the latter's expense, under its supervision and through agreement with it. By virtue of Chapter 17, Article 3, Section 4 of said Code, it is the duty of the Road Commissioner to audit the claims of contractors performing work for it and for those found correct to issue requisitions upon the State Auditor for payment thereof from the State Road Fund.

2. That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn duty to abide by and uphold the Constitution of the United States and of this State, and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty or property without due process of law as required by Section 1 of the Fourteenth Amendment of the Federal Constitution, and Section 10, Article III, of the State Constitution, nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid), and Section 9, Article III of the State Consti-

tution; and all references hereafter to said Federal Constitutional provisions shall be taken to include reference to the aforesaid similar State Constitutional provisions. In pursuance of the duties aforesaid, it is the further duty of Respondents to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property appropriated by them for public use.

II

THE CONTRACT

A.

1. The Road Commission entered into an agreement with the Conservation Commission pursuant to statute for the construction of a certain slack water dam on Castlemen Run in Brooke County for the Conservation Commission at the latter's expense.

2. Thereafter the Road Commission, through Patrick C. Graney, the then Road Commissioner, did after bid award, enter into a contract, hereafter referred to as "contract", with the Petitioner, Paul Price, for the construction of Project 5824 and 7645, called "Castlemen Run Road", located in Brooke and Ohio Counties, West Virginia. The contract consisted of the following documents: (1) The contractor's proposal upon the Commission's form and on its conditions contained; (2) the contract instrument; (3) the Special Provisions to said contract; (4) the Contract bond; (5) the plans and drawings, consisting of two separate sets, 33 sheets for the road construction work on the Road Commission right of way, and 7 sheets for the aforesaid dam work on adjoining property of the Conservation Commission; and (6) the bound volume designated "The Standard Specifications, Roads and Bridges, of the State Road Commission of West Virginia, Adopted 1952," a copy of each of which, except the roadway drawings and plans, is included herewith as part of Exhibit A.

3. Upon the signing of said contract by the parties, the Petitioner Paul Price did acquire a right of property therein within the meaning of the protection of Section 1 of the Fourteenth Amendment and the Fifth Amendment of the Federal Constitution, and likewise upon the construction of the dam under the supervision of the Petitioner R. C. Wetherall, Jr. pursuant to the agreement hereafter mentioned between Petitioners, both Petitioners acquired a right of property in the work performed, and it became and then and thereafter was the duty of Respondents to accord to Petitioners the protection of said contract and their work thereunder guaranteed by the constitutional provisions aforesaid, and not to deprive Petitioners of their rights of property therein without due process of law nor appropriate such rights of property for public use without just compensation.

B.

Said contract was by competitive bid, and was entered into upon the basis of unit prices for estimated quantities of items of work, services, labor and material, as estimated by the Road Commission, and the total estimated contract price, based on estimated quantities, was $134,895.50, and the estimated price of the part of the dam work to be performed under the item "Borrow Pit Excavation," was $21,350.00 for the estimated quantity of 42,700 cubic yards at the unit bid price of 50¢ per cubic yard. The estimated quantities were subject to the requirements of the project, being either more or less than estimated, and the total estimated contract subject to be adjusted on the basis of the agreed unit prices for the quantities actually required.

2. The bid and contract covered (1) highway construction for the Road Commission on its right-of-way, and (2) the slack water dam and causeway construction for the Conservation Commission on its recreational area property which adjoined the Road Commission's right-of-way, and which dam and causeway construction was undertaken by the

Conservation Commission through the office and facilities of the road Commission pursuant to the agreement aforesaid as authorized by statute.

C.

1. Pertinent provisions in the contract documents are as follows:

A. PROVISIONS CONTAINED IN SPECIAL PROVISIONS AND SPECIFICATIONS PERTAINING TO DAM CONSTRUCTION:

(1) In the Bid Proposal Directions and On the Plans and Drawings

The Instructions on the Proposal Form, Schedule of Prices, page 3, and the directions on Sheet 2 of the 7 Sheets of the Plans and Drawings styled "Conservation Commission of West Virginia, Division of Engineers, Castleman Run Lake No. 1, Brooke and Ohio Counties," provides as follows:

> "Dam and causeway are to be constructed of selected *borrow material obtained from the roadway excavation,* core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. *The cost of selecting and segregating the material, hauling and placing, compacting, and all work necessary in completing the dam* and causeway *shall be included in the unit cost bid for* Item 3 and *Item 6.*" (Items 3 and 6 and respectively "Borrow Pit excavation" and "Causeway Embankment Fill"—Ed.) (Italics Supplied).

(2) In the Technical Specifications Pertaining to the Dam

The contract included under the dam and causeway construction an item of work designated Item 3, "Borrow Pit Excavation" (Proposal, Schedule of Prices, p. 2, Line 10). The part of the dam construction covered by this item and to be measured and paid for by the quantity of material used, is specifically described in section 3.14 of the "Tech-

nical Specifications, Castlemen Run Lake No. 1" (p. 6) (being a Special Provision) which reads as follows:

"ITEM NO. 3 BORROW PIT EXCAVATION
3.3 EMBANKMENT

The work covered by this item consists of furnishing all labor, materials and equipment and performing all the excavation and other operation in connection with the construction of embankments, as shown on the plans as directed by the Engineer.

The term "embankment" shall mean the earth fill portion of the dam.

3.14 BASIS OF PAYMENT

Work under this item shall include the furnishing of all labor, plant and materials necessary for the construction of an earthern embankment and outlet channels in accordance with the drawing and specifications. Work to include diversion of creek, cofferdams, stripping, excavation from designated borrow areas and embankment site, transportation and placement of material for embankment construction including clay core, disposal of unsuitable material, grading, compaction of fill with proper moisture content, scarification, backfill adjacent to structures in Item 5, together with any other incidentals necessary to this operation and payment will be made at the price bid per cubic yard measured as excavated from the borrow areas."

B. PROVISION CONTAINED IN ROAD COMMISSION'S STANDARD SPECIFICATONS ROADS AND BRIDGES PERTAINING TO BORROW.

Section 2.3.1 page 54, of The State Road Commission of West Virginia, Standard Specifications Roads and Bridges, Adopted 1952 (414 page blue printed volume) provides as follows:

"BORROW EXCAVATION
2.3.1 DESCRIPTION:

This item shall consist of excavating, transporting, placing and finishing material to complete the road-

way and embankments; which material is not obtainable from any other item of excavation or within the limits of the right-of-way. Borrow Excavation shall be obtained from Borrow Pits as noted on the Plans or otherwise designated by the Engineer, sites for which will be secured and paid for by the Commission."

C. PROVISIONS CONTAINED IN ROAD COMMISSIONS STANDARD SPECIFICATONS, ROADS AND BRIDGES GIVING PRECEDENCE TO PROPOSAL, SPECIAL PROVISIONS AND PLANS OVER STANDARD SPECIFICATIONS IN CASE OF DISCREPANCY OR CONFLICT.

Section 1.5.4, page 17, of "The State Road Commission for West Virginia, Standard Specifications, Roads, and Bridges, Adopted 1952" (blue printed volume) *designed to give controlling effect to the proposal, plans and any documents which are specially drafted with reference to the particular project,* (as were the directions on the bid proposal and the "Technical Specifications, Castlemen Run Lake No. 1" for the dam) reads as follows:

"1.5.4 CO-ORDINATION OF SPECIFICATIONS AND PLANS:

These specifications, the Plans, special provisions, and all supplemental documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all.

They are intended to be complementary, to describe and provide for a complete work. *In case of discrepancy,* figured dimensions shall govern over scaled dimensions. *Plans shall govern over Specifications, proposals and special provisions shall govern over both Specifications and Plans.* The Contractor shall not take advantage of errors or omissions in the Plans or of any discrepancy between the Plans and Specifications." (Italics supplied).

The Standard Road Specifications do not cover dam construction, and the dam work was for the Conservation Com-

mission. Accordingly, section 1.4.3 of the Standard Road Specifications is also applicable and it reads as follows:

"1.4.3 SPECIAL PROVISIONS:

Proposed work or requirements not covered by these specifications will be covered by special provisions. The *special provisions shall govern the work as though part of these specifications and shall take precedence whenever in conflict therewith.*" (Italics supplied).

The "Technical Specifications, Castlemen Run Lake No. 1" (for the dam) describes in detail each of the eight items for dam and causeway construction, and Item 3, "Borrow Pit Excavation," takes up over four, single-spaced legal size sheets, describing the work involved in the item, and being the dam construction.

III

EMPLOYMENT CONTRACT OF PETITIONER WETHERALL WITH PETITIONER PRICE

A.

1. By employment contract dated November 29, 1960, between Petitioner Wetherall and Petitioner Price, Petitioner Wetherall undertook to supervise the performance of the actual work on said project according to the terms contained therein for ninety per cent (90%) of the unit bid prices less the cost and expenses thereof; and that *Petitioner Wetherall was to be paid for the same quantities of work for which Petitioner Price was to receive payment from the Road Commission.*

2. Petitioner Wetherall did thereafter supervise the performance of such work to its completion, including the dam work under the item designated as Borrow Pit Excavation and being the dam construction of selected borrow material obtained from roadway excavation; and he has a subsisting and beneficial property right and interest in

such work and in the payment therefore by respondents to Petitioner Price.

IV

PERFORMANCE OF WORK

A.

1. In accordance with the contract, Petitioner Price, and Petitioner Wetherall as job supervisor under the terms of the agreement aforesaid, did select from the material from roadway excavation as directed by the proposal, drawings and plans, and Technical Specifications, and segregate therefrom, 41,695.5 cubic yards thereof designated as Borrow Pit Excavation, as measured in place by Respondents. And Petitioners did haul, place and compact such material in the dam on the adjoining recreational area property of the Conservation Commission, and perform all of the other operations of work necessary and incidental to the construction of the dam embankment as set forth in detail in the "Technical Specifications, Castleman Run Lake No. 1" which are part of the Special Provisions. Said project and all of the work included therein, has been approved and accepted by the Road Commission, and the dam approved and accepted by the Conservation Commission.

2. During the progress of the work, including the construction of the dam under the item of Borrow Pit Excavation, the Road Commission calculated by monthly estimates the estimated quantities thereof and the amount due therefor at the unit prices and the Road Commissioner issued his periodic requisitions therefor upon the State Auditor for payment to Petitioner Price of the amount thereof, including that under the item of Borrow Pit Excavation, due upon each monthly estimate.

3. That upon the completion and acceptance of said work, the Road Commission calculated the final and total estimate of quantities thereof and the amount due therefor, and certified for payment said 41,695.5 cubic yards of Borrow Pit

Excavation; that subsequently in August, 1963, the Road Commission before payment on such final estimate, arbitrarily and capriciously revised said estimate and totally eliminated the payment for the work in constructing the dam which was comprehended under the item of Borrow Pit Excavation, measured as 41,695.5 cubic yards thereof, and back charged the amounts previously paid for the construction of the dam embankment to amounts acknowledgedly due upon construction of the roadway; and that the Road Commissioner has refused to issue his requisition for payment of the dam construction work represented by 41,695.5 cubic yards of Borrow Pit Excavation.

V

PAYMENT FOR DAM WORK BY CONSERVATION COMMISSION

A.

1. Pursuant to the statutory agreement, the total cost of the construction of the dam and causeway was to be borne by the Conservation Commission, and for which the Legislature appropriated to the Conservation Commission the funds to pay therefor. The total cost, according to the Respondent's own figures (including the $20,847.75 representing the dam construction under the item Borrow Pit Excavation) was $48,134.01.

2. On June 7, 1962, the Road Commission invoiced the Conservation Commission (now Department of Natural Resources) for "Castlemen Run in Brooke in Ohio County $38,990.00" and on June 14, 1962 invoiced it for "Balance due on Castlemen Run Dam, $12,710.00" and "Right-of-Way Costs, $500.00". By Warrant No. 148,828 dated June 15, 1962 and Warrant No. 157,277 dated June 19, 1962, the Conservation Commission paid the Road Commission respectively $38,990.00 and $13,210, which (less right-of-way costs of $500 included therein) represented payment of

$51,700 as reimbursement to the Road Commission for building the dam and causeway.

3. By the revised final estimate of the Road Commission, the Road Commission now represents that the total cost of the dam and causeway was only $27,286.26. Petitioners say that under the statute said $51,700 charged the Conservation Commission was deposited to the State Road Fund. Petitioners believe that of the $24,413.74 difference between said figures, the sum of $20,847.75 thereof, represents reimbursement claimed by the Road Commission from the Conservation Commission for the dam construction under the item of Borrow Pit Excavation, and paid to the Road Commission by the Conservation Commission, and which the Road Commission now refuses to pay the Petitioners.

VI

RESPONDENTS REFUSE PAYMENT AND APPROPRIATE PETITIONER'S PROPERTY

A.

1. Respondents refuse to pay for the dam construction under the item of Borrow Pit Excavation for the alleged reason Section 2.3.1 of the "Standard Specifications Roads and Bridges" allegedly prohibits payment under the item "Borrow Excavation" coming from roadway excavation, notwithstanding to the contrary, and express directions and provisions of the bid instructions, bid proposal and special provisions, all of which governed and took precedence over the Standard Specifications by an express provision of the Standard Specifications themselves.

2. Petitioner Price further says that he has a right of property in the contract aforesaid and Petitioners Price and Wetherall further say they have a right of property in said contract's completion and a right of property in all of the work, labor, services and materials performed under the item Borrow Pit Excavation and incorporated in the

public dam, and that the same is of the value of $20,847.75, and that Respondents, NOTWITHSTANDING the fact the Road Commission has collected from the Conservation the money for the payment of such property and their duties not to deprive Petitioners of their property without due process and not to take such property for public use without just compensation as guaranteed by the Federal Constitutional provisions aforementioned, did wrongfully abrogate the terms of said contract and deprive Petitioner Price of his property right therein, and did wrongfully appropriate Petitioners Price and Wetherall's work, labor, services and materials incorporated in the public dam and deprive Petitioners of their property therein of the value aforesaid without due process and did take same for public use without just compensation in violation of the Federal Constitution provisions aforementioned; and NOTWITHSTANDING Respondents' further duty, in the premises of the duties aforesaid, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property appropriated by them for public use, Respondents, although requested so to do, have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioners and pay them just compensation therefor.

PRAYER

WHEREFORE, Your Petitioners therefore pray that a writ of mandamus be issued, directed to the Road Commission of the State of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, commanding them to forthwith institute in the Circuit Court of Brooke County, West Virginia, a proceeding to acquire from Petitioners under the authority of eminent domain, the following property belonging to Petitioners:

1. Petitioner Price's rights in the contract aforementioned;

2. Petitioners Price and Wetherall's work, labor, services and material incorporated in the public dam aforesaid in Brooke County, West Virginia, and appropriated by Respondents for public use and being comprehended under and described as 41,695.5 cubic yards of Item 3, "Borrow Pit Excavation" under the terms of the contract aforesaid;

and to that end a rule may be issued against them commanding them to appear before this Court on the 15th day of January, 1966, and show cause, if they or either of them can, why they should not do so; and grant unto your Petitioners such other and further relief as the Court may deem proper and as the law may require, and as in duty bound your Petitioners will ever pray, etc.

And for such other and further relief so aforesaid, Petitioners pray in the alternative, that in the event the remedy of mandamus to compel Respondents to institute proceedings in eminent domain as represented by the Attorney General of the State to the United States Supreme Court as being a proper and available remedy, be deemed improper and unavailable by the Court, that the petition herein be taken and treated as a proceeding for declaratory judgment under Article 13, Chapter 55 of the Code of West Virginia, 1931, as amended, and Rule 57 of the Rules of Civil Procedure, and that the Court will:

1. Declare the rights of the Petitioners under and in said contract;

2. Declare the right of Petitioners to have the Road Commissioner certify the performance of the work, services, labor and material in constructing the dam under the item of Borrow Pit Excavation, the quantity thereof as 41,695.5 cubic yards, the price and value thereof as $20,847.75, and issue a requisition for the payment thereof upon the State Auditor,

and for further and coercive relief:

1. That the Road Commissioner be compelled to perform his duty to certify the performance of the work, serv-

ices, labor and material in constructing the dam under the item of Borrow Pit Excavation, and the quantity thereof as 41,695.5 cubic yards, the price and value thereof as $20,847.75 and be compelled to issue the requisition of the Road Commission to the State Auditor for $20,847.75 as payment thereof at the contract price of 50 cents per cubic yard, out of the State Road Fund to which was deposited the reimbursement therefor received from the Conservation Commission; and

2. For such other and further relief, both general and special, as to the Court may seem appropriate in the premises of this alternative prayer.

R. C. WETHERALL, JR.,
PAUL PRICE,
Petitioners,
By Counsel

CARNEY M. LAYNE
638 Fifth Avenue,
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia
Counsel for Petitioners

STATE OF WEST VIRGINIA
COUNTY OF CABELL, to-wit:

R. C. Wetherall, Jr., one of the Petitioners named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be on information he believes them to be true.

R. C. WETHERALL, JR.
Petitioner

Taken, sworn to and subscribed before me this 20th day of December, 1965.

My Commission expires March 19, 1969.

L. J. MEISEL
Notary Public

STATE OF WEST VIRGINIA
COUNTY OF CABELL, to-wit:

Paul Price, one of the Petitioners named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be on information, he believes them to be true.

PAUL PRICE
Petitioner

Taken, sworn to and subscribed before me this 21st day of December, 1965.

My Commission expires 2 Nov. 69.

E. G. MARSHALL
Notary Public

APPENDIX K

Pertinent Provisions of Contract Document Showing Patent Error in Road Commissioner's Interpretation and Which Trial Court Refused to Interpret.

A. Provisions contained in *Special Provisions and Specifications Pertaining to Dam Construction* authorizing payment for dam construction under Item 3, termed Borrow Pit Excavation.

(1) In The Bid Proposal Directions and On The Plans and Drawings:

The Instructions under "note" on the Proposal Form, Schedule of Prices, page 3, and the directions on Sheet 2 of the 7 Sheets of Plans styled "Conservation Commission of West Virginia, Division of Engineering, Castleman Run Lake No. 1, Brooks and Ohio Counties," (both part of Complaint Exhibit A) provides as follows:

> "Dam and causeway are to be constructed of selected *borrow material obtained from the roadway excavation,* core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. *The cost of selecting and segregating the material, hauling and placing, compacting, and all work necessary in completing the dam and causeway shall be included in the unit cost bid for Item 3 and Item 6.*" (Italics supplied). (Items 3 and 6 and respectively "Borrow Pit Excavation" and "Causeway Embankment Fill"—Ed.)

(2) In The Specifications:

The contract included under the dam and causeway construction an item of work designated Item 3, "Borrow Pit Excavation" (Exhibit A—Proposal, Schedule of Prices, p. 2, Line 10). The dam construction covered by this item and to be paid for by the quantity of material used, is specifically described in section 3.14 of the "Technical Specifications, Castlemen Run Lake No. 1" (p. 6) (part of Com-

plaint Exhibit A and being a "Special Provision") which reads as follows:

"ITEM NO. 3 BORROW PIT EXCAVATION
3.3 EMBANKMENT

The work covered by this item consists of furnishing all labor, materials and equipment and performing all the excavation and other operation in connection with the construction of embankments, as shown on the plans or as directed by the Engineer.
The term "embankment" shall mean the earth fill portion of the dam.

3.14 BASIS OF PAYMENT

Work under this item shall include the furnishing of all labor, plant and materials necessary for the construction of an earthen embankment and outlet channels in accordance with the drawing and specifications, work to include diversion of creek, cofferdams, stripping, excavation from designated borrow areas and embankment site, transportation and placement of material for embankment construction including clay core, disposal of unsuitable material, grading, compaction of fill with proper moisture content, scarification, backfill adjacent to structures in Item 5, together with any other incidentals necessary to this operation and payment will be made at the price bid per cubic yard measured as excavated from the borrow areas."

B. Provision contained in Road Commission's *Standard* Specifications Roads and Bridges pertaining to Borrow.

Section 2.3.1 page 54, of "The State Road Commission of West Virginia, Standard Specifications Roads and Bridges, Adopted 1952" (414 page blue printed volume—part of Complaint Exhibit A) provides as follows:

"BORROW EXCAVATION

2.3.1 DESCRIPTION
This item shall consist of excavating, transporting, place and finishing material *to complete the roadway and embankments; which material is not obtainable*

from any other item of excavation or within the limits of the right-of-way. Borrow Excavation shall be obtained from Borrow Pits as noted on the Plans or otherwise designated by the Engineer, sites for which will be secured and paid for by the Commission." (Italics supplied).

On the supposed basis that the application of this *standard* provision precluded payment for the dam construction under Item 3, Borrow Pit Excavation, the Road Commissioner refused payment, on the ground the material used in the dam came from the right of way excavation, *notwithstanding the proposal, special provisions and plans as heretofore set forth expressly directed it be taken from roadway excavation*, and notwithstanding that by other provisions of the standard specifications hereafter set forth, the proposal, special provisions and plans governed and took precedence over the *standard* specifications.

C. Provision contained in Road Commissions Standard Specifications, Roads and Bridges, giving precedence to proposal, special provisions and plans over standard specification in case of discrepancy or conflict.

Section 1.5.4, page 17, of "The State Road Commission of West Virginia, Standard Specifications, Roads and Bridges, Adopted 1959" (blue printed volume part of Complaint Exhibit A) *designed to give controlling effect to the proposal, plans and any documents which are specially drafted with reference to the particular project*, (as was the "Technical Specifications, Castlemen Run Lake No. 1" for the dam) reads as follows:

"1.5.4 CO-ORDINATION OF SPECIFICATIONS AND PLANS:

These specifications, the Plans, special provisions, and all supplemental documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all.

They are intended to be complementary, to describe and provide for a complete work. *In case of discrep-*

ancy, figured dimensions shall govern over scaled dimensions, *Plans shall govern over Specifications, proposals and special provisions shall govern over both Specifications and Plans.* The Contractor shall not take advantage of errors or omissions in the Plans or of any discrepancy between the Plans and Specifications." (Italics supplied).

The Standard Road Specifications do not cover dam construction, and the dam work was for the Conservation Commission. Accordingly, section 1.4.3 of the Standard Road Specifications is also of applicability and it reads as follows:

"1.4.3 SPECIAL PROVISIONS:

Proposed work or requirements not covered by these specifications will be covered by special provisions. The special provisions shall govern the work as though part of these specifications and shall take precedence whenever in conflict therewith." (Italics supplied).

The "Technical Specifications, Castlemen Run Lake No. 1" (for the dam) describes in detail each of the eight items for dam and causeway construction, and Item 3, "Borrow Pit Excavation," takes up over four single-spaced legal size sheets, describing the work involved in the item. The last section of this item, "3.14 Basis for Payment," previously quoted, states that for the dam construction work "payment will be made at the price bid per cubic yard" of "Borrow Pit Excavation."

Without the application of any rules of construction, the contract is express as to meaning and the Road Commissioner's "interpretation" is violative of the contract as prepared by the Road Commission itself, and patently wrong.

No. _____

IN THE

Supreme Court Of The United States

October Term, 1966

R. C. WETHERALL, JR. and
PAUL PRICE,

Appellants,

v.

THE STATE ROAD COMMISSION OF
WEST VIRGINIA, a corporation,
and BURL A. SAWYERS, as State
Road Commissioner,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

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MOTION TO DISMISS

Appellees, pursuant to Rule 16(1) (b) of the Revised Rules of the Supreme Court of the United States, move that appellants' appeal be dismissed on the ground that the judgment of the Circuit Court of Kanawha County, West Virginia, rests on an adequate non-federal basis.

STATEMENT OF THE CASE

On October 28, 1960, appellant Price was awarded a contract by appellee State Road Commission involving certain road, dam and causeway construction. On November 29, 1960, Price and appellant Wetherall entered into a contract providing that Wetherall would perform all the work described in Price's contract with the State Road Commission for 90% of the contract price. The State Road Commission was unaware of the contract between Price and Wetherall during the course of the project, which exceeded the scheduled completion date.

Upon eventual completion of the project, a dispute arose between Price, who still represented that he had performed the work, and appellee Road Commission over certain provisions of the job specifications. It was only then that Wetherall made his presence known.

Appellants former appeal to this Court was dismissed in an opinion per curiam on October 25, 1965. (382 U. S. 45). Subsequently, appellants filed their petition for mandamus. The judicial events occurring thereafter are correctly alleged in appellants' jurisdictional statement at pages 3 and 4.

The opinion of the Circuit Court of Kanawha County, West Virginia, dated March 11, 1966, is the opinion from which appeal is sought.

ARGUMENT

I

The decision of the trial court obviously rests on an adequate non-federal ground as far as appellant Wetherall is concerned. As stated in the Court's opinion at page 74a of appellants' jurisdictional statement: "Grounds 8, 9 and 10 of the demurrer, relating only to petitioner Wetherall's claim, asserting that he is not a real party in interest since he was not a party to the contract, are grounds upon which the former proceeding involving these parties was dismissed and are, accordingly, res judicata. * * *" The prior opinion, found at page 25a of appellants' jurisdictional statement, states: "* * * It is, however, my interpretation that the 'real party in interest' provision of Rule 17 was not intended to give a person who is a stranger to a contract, authority to assert the rights of one of the parties merely because the stranger may ultimately derive what is alleged to be the greatest benefit therefrom, as is the case here. * * *"

The fact that the trial court again decided that appellant Wetherall is not a real party in interest as contemplated by Rule 17 (a) of the West Virginia Rules of Civil Procedure (Appendix A) has no bearing upon any federal question. The Supreme Court of the United States will decline to review state court judgements which rest on an adequate, independent state ground, substantive or procedural. Henry v. Mississippi, 379 U. S. 443. It is argued that appellant We-

therall is not a real party in interest and that the trial court's decision stating same was correct. The appeal should be dismissed as to him.

II

Concerning appellant Price, it is true that the Circuit Court of Kanawha County upheld the constitutionality of Article VI, Section 35 of the State Constitution despite appellants' repeated assertions of its repugnancy to the 14th Amendment to the United States Constitution. It is submitted, however, that the judgment as to Price rested on an adequate non-federal ground, independent of the "immunity" clause of the State Constitution. Review by the Supreme Court of the United States is precluded if the state court's judgment rests on an adequate non-federal ground, even if federal questions are involved. Henry v. Mississippi, supra.

It is suggested that the Circuit Court of Kanawha County principally based its decision upon the fact that a proceeding in eminent domain could not be utilized in a case such as was presented. The Court stated, as noted at page 74a of appellants' jurisdictional statement, that the situation was not proper for eminent domain for the same reasons noted in the Howard Price case. The opinion in that case, decided the same day, is reproduced as Appendix E to appellants' jurisdictional statement. At page 78a, we read: "* * * However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding * * *." And, as noted on page

79a, appellants' jurisdictional statement, the trial court stated: "* * * I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here." The Circuit Court of Kanawha County, construing the West Virginia Constitution as it deals with eminent domain, decided that such proceedings were not proper in a contract dispute. The Court also noted that mandamus would not lie in any circumstance where there is no clear legal right to the writ.

III

Appellants' prior appeal was dismissed by this Court in an opinion per curiam at 382 U. S. 45. This Court, citing Howard Price d/b/a Howard Price v. State Road Commission, etc., 382 U. S. 20, stated: "The motion to dismiss is granted and the appeal is dismissed." The other Price case was dismissed by this Court with the following language: "The motion to dismiss is granted and the appeal is dismissed in the light of the representations of the Attorney General of West Virginia that there is open to the appellant an effective state procedure of which he has not availed himself." Appellees motion to dismiss in the former case, set out as Appendix B to appellants' jurisdictional statement, suggested two State remedies. Appellants have tried the suggested remedy of eminent domain but they have failed to submit a claim against the State following the procedures provided by the Legislature. It is suggested that, in its per curiam opinion cited above, this Court did not limit appellants to only one of the two available remedies.

The Legislature of the State of West Virginia, in its 1967 session, established and created a " Court of Claims." The official acts of the Legislature have not yet been codified so the only available reference source is the bill as enrolled in the office of the Secretary of State. The bill, Enrolled Senate Bill No. 332, was passed March 11, 1967 and becomes effective on July 1, 1967. The complete bill is set out in Appendix B to this motion to dismiss. Now, appellant cannot complain that he is forced to submit his claim to the Attorney General, who formerly acted as an administrative agency of the Legislature in the processing and hearing of claims against the State. Under the provisions of the new legislation, appellant as a claimant is entitled to a full evidentiary hearing before the Court of Claims.

It is recognized that the Court of Claims findings are not binding on the Legislature. It is, however, the remedy which the State has provided in cases such as the *one herein*. Appellant has been told that he cannot proceed by way of declaratory judgment or by way of eminent domain. It is apparent that the Court of Claims was created for just such a situation as here exists. Indeed, section 1 of the bill (Appendix B) provides that "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state * * * cannot be determined in the regular courts of the state * * *." The Legislature thus recognized and specifically approved of the immunity clause. In Cunningham v. County Court of Wood County, 148, W. Va. 308, 134 S. E. 2d 725, the West Virginia Supreme Court of Appeals in 1964 considered the doctrine of sovereign immunity.

"* * * Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

CONCLUSION

It is respectfully submitted that the judgment from which appeal is sought rests on on adequate non-federal grounds as to both appellants. Furthermore, an effective State remedy is available in the new Court of Claims. It is argued and submitted that the appeal should be dismissed.

Respectfully submitted,

C. DONALD ROBERTSON
ATTORNEY GENERAL
STATE OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

GEORGE H. MITCHELL
ASSISTANT ATTORNEY GENERAL
STATE OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

APPENDIX A

Rule 17.

Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, or any other fiduciary, or a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in his own name without joining with him the party for whose benefit the action is brought; and in subrogation and similar cases, the court shall apply this subdivision as will promote justice. When a law of the State so provides, an action for the use or benefit of another shall be brought in the name of the state or any political subdivision thereof.

APPENDIX B

ENROLLED

Senate Bill No. 332

(By Mr. Jackson)

[Passed March 11, 1967; in effect July 1, 1967.]

AN ACT to repeal sections one, three, four, five, six, seven, eight, nine, ten, eleven and twelve, article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend said article two by adding thereto twenty-eight new sections, designated sections one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, creating a court of claims; providing a legislative purpose and definition; providing for a clerk and other employees thereof;

the terms and meeting place of said court, the compensation, oath and qualifications of the judges thereof; providing the general powers and jurisdiction of the court; establishing exclusions to the jurisdiction; providing for the rules of practice and procedure; establishing a regular procedure, shortened procedure, and advisory determination procedure; providing for claims under existing appropriations and special appropriations; establishing a period of limitation; providing for compulsory process, inclusion of awards in the budget, records to be preserved, and for the reports of the court; prohibiting fraudulent claims and providing a penalty and forfeiture upon conviction thereof; providing for the conclusiveness of the court's determination; specifying policy concerning awards; providing for representation of the state by the attorney general; and providing a severability clause.

Be it enacted by the Legislature of West Virginia:

That sections one, three, four, five, six, seven, eight, nine, ten, eleven and twelve, article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and to amend said article two by adding

thereto twenty-eight new sections designated sections one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, to read as follows:

ARTICLE 2. CLAIMS AGAINST THE STATE.

§14-2-1. Purpose.

The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in the regular courts of the state; and to provide for proceedings in which the state has a special interest.

§14-2-3. Definitions.

For the purpose of this article:

"Court" means the state court of claims established by section three of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of state government: *Provided*, That a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of the state regardless of any state aid that might be provided.

§14-2-4. Creation of court of claims; appointment and terms of judges.

The "Court of Claims" is hereby created. It shall consist of three judges, to be appointed by the president of the Senate and the speaker of the House of Delegates, by and with the advice and consent of the Senate, one of whom shall be appointed presiding judge. Each appointment to the court shall be made from a list of three qualified

nominees furnished by the board of governors of the West Virginia state bar.

The terms of the judges of this court shall be six years, except that the first members of the court shall be appointed as follows: One judge for two years, one judge for four years and one judge for six years. As these appointments expire, all appointments shall be for six-year terms. Not more than two of the judges shall be of the same political party. An appointment to fill the vacancy shall be for the unexpired term.

§14-2-5. Court clerk and other personnel.

The court shall have the authority to appoint a clerk. The clerk's salary shall be fixed by the joint committee on government and finance, and shall be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards.

The joint committee on government and finance may employ other persons whose services shall be necessary

to the orderly transaction of the business of the court, and fix their compensation.

§14-2-6. Terms of court.

The court shall hold at least two regular terms each year, on the second Monday in April and September. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the court whenever the number of claims awaiting consideration, or any other pressing matter of official business, make such a term advisable.

§14-2-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the state, the court may convene at any county seat.

§14-2-8. Compensation of judges; expenses.

Each judge of the court shall receive seventy-five dollars for each day actually served, and actual expenses

incurred in the performance of his duties. The number of days served by each judge shall not exceed one hundred in any fiscal year, except by authority of the joint committee on government and finance. Requisitions for compensation and expenses shall be accompanied by sworn and itemized statements, which shall be filed with the auditor and preserved as public records. For the purpose of this section, time served shall include time spent in the hearing of claims, in the consideration of the record, in the preparation of opinions, and in necessary travel.

§14-2-9. Oath of office.

Each judge shall before entering upon the duties of his office, take and subscribe to the oath prescribed by article four, section five of the constitution of the state. The oath shall be filed with the clerk.

§14-2-10. Qualifications of judges.

Each judge appointed to the court of claims shall be an attorney at law, licensed to practice in this state, and shall have been so licensed to practice law for a period of not less than ten years prior to his appointment as judge. A judge shall not be an officer or an employee of any

branch of state government, except in his capacity as a member of the court and shall receive no other compensation from the state or any of its political subdivisions. A judge shall not hear or participate in the consideration of any claim in which he is interested personally, either directly or indirectly.

§14-2-11. Attorney general to represent state.

The attorney general shall represent the interests of the state in all claims coming before the court.

§14-2-12. General powers of the court.

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or for some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state. No liability shall be imposed upon the state or any state agency by a determination of the court of claims approving a claim and recommending an award, unless the claim is (1) made under an existing appropriation, in accordance with section nineteen of this article, or (2) a claim under a special appropriation, as provided

in section twenty of this article. The court shall consider claims in accordance with the provisions of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. Each claim shall be considered by the court and if, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

§14-2-13. Jurisdiction of the court.

The jurisdiction of the court, except for the claims excluded by section fourteen, shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its

agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

§14-2-14. Claims excluded.

The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

2. For a disability or death benefit under chapter twenty-three of this code.

3. For unemployment compensation under chapter twenty-one-a of this code.

4. For relief or public assistance under chapter nine of this code.

5. With respect to which a proceeding may be maintained against the state, by or on behalf of the claimant in the courts of the state.

§14-2-15. Rules of practice and procedure.

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims. Rules shall permit a claimant to appear in his own behalf or be represented by counsel.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of a claim.

§14-2-16. Regular procedure.

The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and

shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine

or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

§14-2-17. Shortened procedure.

The shortened procedure authorized by this section shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-18. Advisory determination procedure.

The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the state or a state agency. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk, the record of the claim including a full statement of the facts, the conten-

tions of the claimant, and such other materials as the rules of the court may require. The record shall submit specific questions for the court's consideration.

2. The clerk shall examine the record submitted and if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When a claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim. An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be de novo.

§14-2-19. Claims under existing appropriations.

A claim arising under an appropriation made by the Legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the appropriate state agency, the state auditor, and to the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to

further review by the auditor upon any matter determined and certified by the court.

§14-2-20. Claims under special appropriations.

Whenever the Legislature makes an appropriation for the payment of claims against the state, then accrued or arising during the ensuing fiscal year, the determination of claims and the payment thereof may be made in accordance with this section. However, this section shall apply only if the Legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award, and requisition relating thereto, to the auditor. The auditor thereupon shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim except for the question of a sufficient unexpended balance in the appropriation.

§14-2-21. Periods of limitation made applicable.

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article, unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corporation and the constitutional immunity of the state from suit were not involved; but the foregoing provision shall not be held to limit or restrict the right of any person, firm or corporation who or which has a claim against the state or any state agency, pending before the attorney general on the effective date of this article, from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim as may be, on the effective day of this article, pending in any court of record as a legal claim and which, after such date, may be adjudicated in such court to be invalid as a claim against the state because of the constitutional immunity of the state from suit.

§14-2-22. Compulsory process.

In all hearings and proceedings before the court, the evidence and testimony of witnesses and the production of documentary evidence may be required. Subpoenas may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a subpoena or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

§14-2-23. Inclusion of awards in budget.

The clerk shall certify to the director of the budget, on or before the twentieth day of November of each year, a list of all awards recommended by the court to the Legislature for appropriation. The clerk may certify supplementary lists to the board of public works to include sub-

sequent awards made by the court. The board of public works shall include all awards so certified in its proposed budget bill transmitted to the Legislature.

§14-2-24. Records to be preserved.

The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the Legislature or any committee thereof for the reexamination of the claim.

§14-2-25. Reports of the court.

The clerk shall be the official reporter of the court. He shall collect and edit the approved claims, awards and statements, and shall prepare them for publication and submission to the Legislature in the form of an annual report.

Claims and awards shall be separately classified as follows:

1. Approved claims and awards not satisfied but referred to the Legislature for final consideration and appropriation.

2. Approved claims and awards satisfied by payments out of regular appropriations.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the fiscal year.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its annual report to the presiding officer of each house of the Legislature. The annual reports of the court shall be published by the clerk as a public document.

§14-2-26. Fraudulent claims.

A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer or employee who knowingly and wilfully participates or assists in the preparation or presentation of a false or fraudulent claim, shall be guilty of a misde-

meanor. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer or employee, he shall, in addition, forfeit his office or position of employment, as the case may be.

§14-2-27. Conclusiveness of determination.

Any final determination against the claimant on any claim presented as provided in this article shall forever bar any further claim in the court arising out of the rejected claim.

§14-2-28. Award as condition precedent to appropriation.

It is the policy of the Legislature to make no appropriation to pay any claims against the state, cognizable by the court, unless the claim has first been passed upon by the court.

§14-2-29. Severability.

If any provisions of this article or the application thereof to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications

of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

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No. 177

IN THE

Supreme Court of the United States

October Term, 1967

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

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No. 177

In The

Supreme Court of the United States

October Term, 1967

R. C. Wetherall, Jr. and Paul Price

Appellants

v.

The State Road Commission of West Virginia, a Corporation, and Buel A. Sawyers, as State Road Commissioner,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

STATEMENT OF THE CASE

The mandamus petition avers, and for jurisdictional purposes here as well as on the demurrer in the trial Court, it must be taken as true, *Ickes* v. *Fox*, 300 U.S. 82, 96, that by arbitrary action of the State Road Commissioner under color of office and without authority, the Road Commissioner, after paying Appellants for the dam construction by monthly estimate, upon its completion and acceptance, ignored the patent terms of the contract and wrongfully deducted such payments from money still acknowledgedly due for roadway construction, thereby appropriating Appellants' work, services, labor, and material of the value of $20,847.75 which were incorporated in the public dam for public use. The petition was to compel the Appellees to institute eminent domain proceedings to legally acquire and pay for Appellants' property. *The appropriation of*

Appellants' property for public use without compensation and without due process of law is the core of Appellants' petition. Appellees met Appellants' charges with a demurrer interposing as a bar the absolute immunity provision of Section 35, Article VI, of the State Constitution. *The trial Court applied the immunity provision to this case* and turned Appellants out of Court.

ARGUMENT

I

APPELLEES' CONTENTION OF ADEQUATE NON-FEDERAL GROUNDS IS FRIVOLOUS AND WITHOUT MERIT

As to Wetherall, Appellees rest this contention on the trial Court's holding that Wetherall was not a real party of interest because he was not a party to the contract, despite the fact he has 90% interest in the dam work and the compensation therefor, and alleged his property had been appropriated by the Road Commission in violation of his rights under the Fourteenth Amendment. Whether this ground is an adequate non-federal ground is a question of Federal law, and this Court is not concluded by the view taken by the state court. *Staub* v. *Baxley,* 355 U.S. 313. The situation of the parties is within the principle enunciated in *Sauffront* v. *La Compagnie Des Sucreries,* 217 U.S. 475, and *McArthur* v. *Scott,* 113 U.S. 340, 386, and in view thereof, Appellees' contention of adequate non-federal ground as to Wetherall is without any fair or substantial support. *Staub* v. *Baxley,* supra, *Lawrence* v. *State Tax Commission,* 286 U.S. 276, *Wolfe* v. *North Carolina,* 364 U.S. 177; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449.

The petition alleges, and on Motion to Dismiss it must be taken as true, that Wetherall supervised the dam work and his compensation was tied directly to its payment by Appellees. Accordingly, the work being taken without

compensation was 90% Wetherall's property, *whether he was a contracting party or not.* After an objection on Federal grounds is raised, the jurisdiction of this Court is plain if the non-federal ground *is not of sufficient breadth to sustain the judgment without any decision on the federal ground. Abie State Bank* v. *Bryan*, 282 U.S. 765, *Enterprise Irr. Dist.* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157. It is apparent that as to Wetherall it required decision on the Federal ground.

As to Price, Appellees rest their contention on the fact that the trial Court held this was not a proper "subject" for an eminent domain proceeding. However, such holding (Juris. Statement, Appendix D, Letter Opinion of Trial Court, dated March 11, 1966, p. 75a; and Appendix E, Letter Opinion of Trial Court, dated March 11, 1966, in *Price* v. *State Road Commission*, pp. 78a, 79a) is based upon, and the result of, the interposition of the state constitutional immunity provision, *the application of which to the facts of this case is the very Federal ground on which this appeal is taken.* This proceeding from its inception and on this appeal, has been focused on the clear conflict between Appellants' Federal constitutional rights and the application of the State constitutional immunity provision, the latter of which under the Supremacy Clause of Article VI, Clause 2, of the Federal Constitution, must give way. (*Hamm* v. *City of Rock Hill*, 379 U.S. 306; *Hill* v. *Florida*, 325 U.S. 538; *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184.

Appellees' contention begs the very question which Appellants seek to have determined. It ill becomes Appellees to challenge the propriety of the very remedy which it represented in the prior appeal to be proper and available. (Juris. Statement, Appendix B, Motion To Dismiss, pp. 67a, 68a). Constitutional rights are not so ephemeral as to be resolved by such trifling expediency.

II

THE POSSIBILITY OF A LEGISLATIVE GRATUITY IS NOT A REMEDY AND DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS.

Appellees repudiated in the trial Court their representations to this Court on the prior appeal that this mandamus proceeding is an effective State remedy. They now have the temerity to come again in this Court and brazenly suggest that Appellants should try another of Appellees' "remedies". Appellees' demurrer was not grounded on choice of remedy, but solely on the trial Court's lack of jurisdiction to afford any judicial remedy to Appellants on the basis of the constitutional immunity provision. *In both the previous declaratory judgment proceeding and in this mandamus proceeding, the trial Court has held Appellants have no remedy whatsoever.*

Appellees contend that effective July 1, 1967, with the creation of the "Court Of Claims" (Chap. 14, Art. 2, Code of West Virginia, 1931, as amended by Enrolled Senate Bill 332, West Virginia Legislature, 1967), Appellants can now present their claim to such "Court". This is patently an *ad hoc* argument to try to again avoid this Court's jurisdiction. The newly established "Court Of Claims" *is not a judicial body.* It is not a part of the judicial branch of the state government, *but is simply an advisory body to the Legislature.* It considers and advises the Legislature on claims which the Legislature *might* deem moral obligations. *There is no appeal from the "Court's" advice to the Legislature or the Legislature's action or lack of action on such advice.* Appellees recognize its lack of effectiveness with their statement that "the Court Of Claims findings are not binding on the Legislature". (Motion To Dismiss Appeal, p. 5).

Appellees now say that it is the only "remedy" which the State has provided in such a case as at bar. We submit that it *is no remedy at all*, and that it is the lack of effective

State remedy, *by reason of the application of the constitutional immunity provision*, as has already been twice patently determined by the State judiciary, which is the gist of this appeal.

Appellees' suggestion is that Appellants may pursue their claim solely as a *moral obligation* of the State, and not as a *legal right*. It should be noted that the statute relating to claims before the "Court Of Claims" expressly excludes any claim:

> "5. With respect to which a proceeding may be maintained against the state by or on behalf of the claimant in the courts of the state".

Thus, all other considerations aside, it is apparent that Appellees' suggestion begs the question as to whether Appellants should be provided a judicial forum in which to establish and enforce their rights, for by the very terms of the statute, the procedure cannot be availed of if a judicial remedy is proper.

This statute provides for the presentation of a claim to the "Court Of Claims" to the end that it *may, in its discretion*, recommend to the Legislature that such claim be recognized as a *moral* obligation of the State and for which the Legislature *may, in its discretion*, make an appropriation for its satisfaction, on the basis of the complete absence of any judicially cognizable right.

It has been held insofar as Federal officials are concerned, that in the event of abuse of power of office, a claimant will not be relegated to a court of claims. *Land* v. *Dollar*, 330 U.S. 731, 738. This is especially true in cases such as at bar, for constitutional rights are peculiarly within the sphere of judicial protection. The Constitution which guarantees Appellants' rights, likewise insures them the privilege of having those rights *judicially protected*. *Lawrence* v. *State Tax Comm.*, 286 U.S. 276.

What Appellees are in essence suggesting, is that Appellants *be denied the judicial forum* and forced to submit the protection of their property and their constitutional rights to the *whim and caprice of the legislative political arena from which there can be no appeal. It is a cul de sac.*

Appellants' constitutional rights of due process and protection of their property against public use without compensation, are not to be so lightly treated. A recommendation by a "Court of Claims", in its discretion to be *made or denied*, for a Legislative gratuity, in its discretion to be *given or withheld*, by its inherent limitation, is not and cannot be due process of law. The Rule Of Men as expressed in legislative discretion cannot be substituted for the Rule Of Law guaranteed by the principles of due process.

CONCLUSION

Probable jurisdiction should be noted; the judgment of the trial Court reversed; and this Court should enter, or direct the trial Court to enter, an order compelling the Appellees to institute an eminent domain proceeding to acquire Appellants' property as sought in the mandamus petition.

July 3, 1967

Respectfully submitted,

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Nos. 176 and 177

IN THE

Supreme Court of the United States

October Term, 1967

HOWARD PRICE, D/B/A HOWARD PRICE AND COMPANY
Appellant

v. (No. 176)

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER
Appellees

R. C. WETHERALL, JR. AND PAUL PRICE
Appellants

v. (No. 177)

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND UPON TREATING AS PETITION FOR CERTIORARI, DENYING THE WRIT

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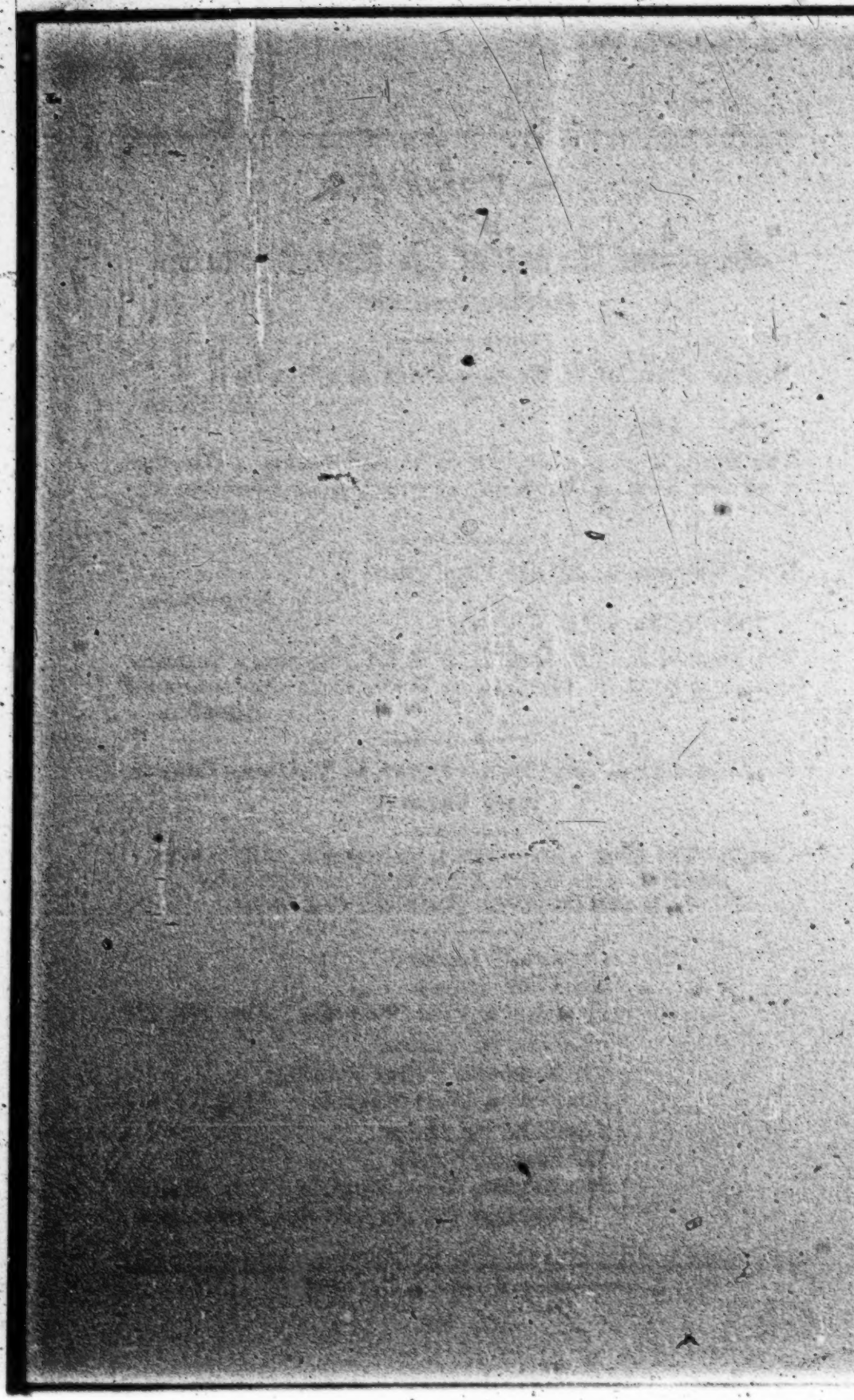

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PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND UPON TREATING AS PETITION FOR CERTIORARI, DENYING THE WRIT

Appellants respectfully request that this Court grant rehearing of its order of October 9, 1967, which dismissed the appeals, and having treated the papers as petitions for certiorari, denied certiorari, and that the Court now grant writs of certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRITS

The West Virginia Court of Claims came into existence on July 1, 1967, during the pendency of these appeals and after the filing of the Jurisdictional Statements. Its existence was relied upon in Appellees' Motions to Dismiss as a "court" which could furnish Appellants an adequate state remedy. Appellants' Jurisdictional Statements were oriented to due process under the Fourteenth Amendment, and this intervening circumstance makes pertinent questions arising under the civil rights statute (R.S. 1977, 1979; 42 USCA Sec. 1981, 1983), and under the equal protection clause of the Fourteenth Amendment, which were available to Appellants but not presented.

The constitutionality of this court of claims and its acts has not been established in any court. A previous court of claims existed in West Virginia in 1941 to 1953 and was abolished. It had been held not to be a judicial body but a legislative body only, whose function was entirely recommendatory on moral obligations only, without judicial review, and dissimilar to the U.S. Court of Claims, (*State* v. *Simms*, 127 W.Va. 786, 34 SE 2d 585), which is a court of judicial powers (*Pope* v. *U.S.*, 323 U.S. 1). The new court of claims is subject to attack on constitutional and other grounds and offers Appellants no assurance of any ultimate relief.

Appellees obtained dismissal by this Court of Appellants' first appeals upon the representation that the immunity provision could not be invoked against the suggested remedy of mandamus. They then invoked such immunity when Appellants instituted those mandamus proceedings. On this second appeal Appellees sought dismissal upon the representation that the immunity provision cannot be invoked against the Court of Claims procedure. It must be assumed that once judicial proceedings are dismissed and Appellants are rele-

gated to the Court of Claims, Appellees will again play "fast and loose" with this Court and again assert the immunity provision on the ground Appellants are estopped to deny the legal nature of their rights and that such Court cannot hear the claims, since as legal claims (as distinguished from "moral obligations") they are within the prohibition of the immunity provision, and expressly excluded from consideration by the Court of Claims by the creating act. This litigation, through two separate proceedings and two appeals to this Court, in each case, has consumed 4½ years on the sole question of seeking a remedy not interdicted by the immunity provision.

DENIAL OF EQUAL PROTECTION OF LAW

The Road Commission and Commissioner have a right to sue contractors in the State Courts on matters involving contracts and construction thereunder. By virtue of the immunity provision, contractors, however, under the trial court's holding cannot have such a right against the Commission and Commissioner. If it were determined that the court of claims is validly established, its remedy, being advisory and only for a legislative grace that may be ultimately given or withheld, and without appeal, is a separate *but not an equal remedy;* it cannot afford equal protection. It is the lack of judicial remedy which constitutes a denial of the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment.

DENIAL OF CIVIL RIGHTS

The rights sought to be enforced by Appellant are civil rights encompassed under the Civil Rights Statute (42 USCA 1981, 1983). They give Appellant a *federally cognizable cause of action* the same as was involved in *Parden* v. *Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, and against which it was held that the Alabama constitutional immunity provision, *identical to that of West Virginia,* could not be invoked.

The mandamus petitions contain the essential allegations under the statute and expressly set forth Appellees' wrongful and arbitrary actions under color of law, (*Monroe* v. *Pape*, 365 U.S. 167). By such actions themselves, Appellees have subjected, and by the invocation of the constitutional immunity provision on the institution of these mandamus proceedings, caused Appellants to be subjected, to the deprivation of their rights. A constitutional provision is within the ambit of 42 USCA 1983. (*Giles* v. *Harris*, 189 U.S. 985). A litigant will not be relegated to a court of claims on a showing of arbitrary action. (*Land* v. *Dollar*, 330 U.S. 731).

The exhaustion of state remedies is not prerequisite to assertion of Appellants' rights under the cause of action created by the Civil Rights Statute. *McNeese* v. *Board of Education*, 373 U.S. 668; *Monroe* v. *Pape*, supra.)

Four other states have rigid constitutional immunity provisions identical to that of West Virginia. Eleven states have a claims procedure which allows for judicial review. Twenty-six states allow actions in their regular court systems.[1] The civil rights statute does not admit of variance between the states. (*Basista* v. *Weir*, 340 F2d 74). Approximately 80% of the states have waived immunity on highway contract claims[2].

Civil rights may be vindicated by any suitable remedy (42 USCA 1988), and if necessary, this Court may fashion a remedy for their protection (*Woods* v. *Nierstheimer*, 328 U.S. 221), and state procedural remedies may be adopted for such purpose as part of the federal law (*Textile Work-*

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[1] Jenkins, Public Contract Remedies in the United States at the State and Local Level, A.B.A., Vol. 1 Public Contracts Law Jour. It is estimated over 200 articles and notes dealing with immunity have been written since the turn of the century, Note 37, Schultz, "Ohio Sovereign Immunity: Long Lives The King", 26 Ohio St. LJ p. 80.

[2] First Annual Report of American Road Builders Associations Task Committee on Highway Claims, March 31, 1967.

ers v. *Lincoln Mills*, 353 U.S. 448). Mandamus to compel the institution of an eminent domain proceeding, and an eminent domain proceeding itself, are such remedies in this case.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statements it is urged that rehearings be granted, and that upon such rehearings and treating the papers whereon appeals were taken as petitions for certiorari, writs of certiorari issue to the Circuit Court of Kanawha County, West Virginia.

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Attorneys for Appellants—Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Of Counsel for Appellants-Petitioners

Nos. 176, 177

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

PRICE ETC. *v.* STATE ROAD COMM'N OF WEST VIRGINIA ET AL.; and

WETHERALL ET AL. *v.* STATE ROAD COMM'N OF WEST VIRGINIA ET AL.

APPEALS FROM THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY.

Nos. 176 and 177. Decided October 9, 1967.

PER CURIAM.

The motions to dismiss are granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

THE CHIEF JUSTICE and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted.